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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1309

DENNIS TURNER, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BOYD TACKETT
421 Hickory
Texarkana, Arkansas 75501
ROYCE S. WEISENBERGER, JR.
501 East Sixth Street
Texarkana, Arkansas 75501
Attorneys for Petitioner

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CITATIONS

Cases:

Ashe v. Swenson, 387 US 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970)

Davis v. O'Hara, 266 US 314, 45 S.Ct. 104 69 L. Ed. 303 (1924)

Davis v. Wechsler, 263 US 22, 24 (1923)

Duvall v. State, 111 Ohio St. 657, 146 NE 90 (1924)

Eagle v. Florida, Fla , 249 So.2d 460 (1971)

Harris v. State, 193 Ga. 109, 175 E2d 573, 147 ALR 980 (1941)

Harris v. Washington, 404 US 55, 92 S.Ct. 183 (1971)

People v. Cunningham, 62 Misc. 2d 515, 308 NYS2d 990 (March 1970)

Reece v. Georgia, 350 US 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955)

Simpson v. Florida, 403 US 384, 91 S.Ct. 1801 (1971)

State v. Barton, 5 Wash. 234, 105 P.2d 63, (1940)

State v. Greely, 30 NJ Super. 542, 103 A2d 639, Affd. on op. below 31 NJ Super. 542, 107 A2d 439 (1954)

State v. Hall, 86 Idaho 63, 383 P.2d 602 (1963)

Turner v. State, 248 Ark. 367, 452 SW2d 317 (1970)

Turner v. State, 251 Ark. 499, 473 SW2d 904 (1971)

Urie v. Thompson, 337 US 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 ALR2d 252 (1949)

Other Material:

United States Constitution, Amend. V

United States Constitution, Amend. XIV

Moore's Federal Practice, Vol. 1B, Paragraph 0.404(10)

9 ALR3d 254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

DENNIS TURNER, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner Dennis Turner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas in this proceeding, which judgment became final on January 10, 1972.

OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Appendix hereto. It is reported at 251 Ark 499, 473 SW2d 904.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 29, 1971. It became final on January 10, 1972, when Petitioner's timely petition for rehearing was denied. This peti-

tion for certiorari was filed within ninety days of the latter date. This Court has jurisdiction under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's federal right of protection against double jeopardy was violated by an indictment for robbery after an acquittal of murder while in perpetration of that robbery.

2. Whether a consideration of the above question is forestalled by the doctrine of "law of the case."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part:

> nor shall any person be subject for the same offense to be twice put in peopardy of life or limb.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> nor shall any State deprive any person of life, liberty, or proprety, without due process of law . . .

STATEMENT OF THE CASE

On April 24, 1969, a jury in the Circuit Court of Hempstead County, Arkansas, returned a general verdict of not guilty on an information charging the Petitioner with murdering Larry Wayne Yates while robbing him. (App. p. 1a).

On October 3, 1969, a grand jury of the Circuit Court of Hempstead County, Arkansas, returned an indictment charging Petitioner with the same robbery as alleged in the murder information (App. p. 15a). In response to that indictment, the Petitioner filed his motion to dismiss based upon double jeopardy. The Trial Court denied the motion and appeal was taken to the Supreme Court of Arkansas. At this point the transcript of the prior murder trial was not a part of the robbery case record on appeal. In *Turner v. State*, 248 Ark 367, 452 SW2d 317, dated March 30, 1970, that Court affirmed the Trial Court (App. p. 2a). The Supreme Court of Arkansas mentioned the doctrine of res judicata in its opinion. It found, however, that since Arkansas statutory criminal procedure prevented the murder charge and the robbery charge from being joined together for trial, the acquittal on the murder charge could not be con-

sidered an adjudication on the robbery charge and res judicata did not apply (App. p. 9a).

Seven days after that decision this Court delivered the opinion of *Ashe v. Swenson*, 397 US 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) stating that the principle of collateral estoppel applies to the double jeopardy provision of the Fifth Amendment of the Constitution of the United States. Under the strict rules of the Supreme Court of Arkansas for petitions for rehearing, (Rule 20), i.e. filed within seventeen (17) calendar days of the decision; no extensions of time for filing except illness or casualty; petition, brief, style of the case and certificate of counsel not to exceed two legal size, double spaced, typewritten pages; Petitioner filed petition for rehearing arguing the application of *Ashe v. Swenson*, supra. Such petition was denied without opinion.

Petitioner then had prepared the seven hundred page transcript of the prior murder trial, submitted such into the Trial Court record of the robbery case and moved that Court for a dismissal of the robbery indictment on the basis of *Ashe v. Swenson*, supra. The motion was denied and appeal was taken to the Supreme Court of Arkansas. In case of *Turner c. State*, 261 Ark 499, 473 SW2d 904, the

Trial Court was affirmed by the Supreme Court of Arkansas based upon the doctrine of "law of the case." (App. p. 16a.) The total reasoning of the Supreme Court of Arkansas on the point was contained in one paragraph, (App. p. 20a):

> "The rationale of *Ashe* is that "collateral estoppel' is encompassed within the ambit of double jeopardy constitutional prohibitions. See also, *De Sacia v. State*, 469 P.2d 369 (Alaska 1970); *State v. Hite*, 3 Wash. App. 9, 472 P.2d 600 (1970). The terms 'collateral estoppel' and 'res judicata' are ofter used interchangeably in criminal cases. *De Sacia v. State*, supra. The former has been considered an aspect of the latter. *Hoag v. New Jersey*, 365 US 464, 78 S.Ct. 829, 2L.Ed.2 913 (1958), reh. denied, 367 US 933, 78 S.Ct. 1366, 2L.Ed. 1375 (1958). See 46 Am. Jur. 2d 565, Judgments Secs. 397; Stone, Res Judicata in Criminal Cases, 27 Texas Law Review 231 (1948). Because 'collateral estoppel' is included in both concepts relied upon by the appellant in both motions, there can be no doubt that the decision on the first appeal governs this appeal as the law of the case."

Petitioner timely filed his petition for rehearing which was denied without opinion on January 10, 1972.

It was stipulated (App. p. 12a) in the record of the second appeal by Petitioner and the State that:

(a) The exact same evidence and no

more will be introduced at the robbery trial as was introduced at the murder trial.

(b) If Petitioner did not kill or participate in the killing of the deceased, he did not rob or participate in the robbing of the deceased.

The murder trial record reflects that the deceased was found shot to death on a back road outside of Hope, Arkansas early in the morning of December 25, 1968. The police were directed to the body by Richard Turner and Johnny Mitchell.

Turner and Mitchell testified that they, Petitioner and the deceased, played poker together in Hope on the evening of December 24 and predawn of December 25, 1968. That after the game broke up, the Petitioner and the deceased took Turner to his home in Hope. That unknown to the deceased, Petitioner borrowed the murder gun and shells from Turner and left with the deceased. That shortly thereafter Petitioner went to both of their homes and told them he had shot the deceased and gotten his money. That he told them where the body was and asked them to lie for him. That they then went to the police and reported the whole matter.

The police stated they went to Petitioner's home

in Hope that morning and found him asleep. That when they questioned the Petitioner about the gun and money, he located them in the closet in his bedroom.

Petitioner testified that he drank alot at the poker game and had also been taking aspirin and cold medicine. He got very drunk and dizzy and did not remember anything from the time the game broke up until he awoke alone in his car parked in front of his home at dawn. He had a pistol stuck in his belt and a strange billfold in his left front pocket. He went inside, threw the things in his closet and went to bed. He was awakened by the police. When repeatedly questioned by them about the gun and the money, he recalled the items and where they were.

The gun was positively indentified as the murder weapon and the billfold as belonging to the deceased.

REASONS FOR GRANTING THE WRIT

1. This Court held in *Ashe v. Swenson*, supra, where a previous judgment of acquittal was based upon a general verdict, a court considering the issue of double jeopardy must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and con-

clude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. This is the approach that will assure the application of the principle of collateral estoppel with realism and rationality.

The Trial Court and the Supreme Court of Arkansas have refused to adhere to that mandate. In the first appeal, *Ashe v. Swenson*, supra, and its requirements were brought to the attention of the Court on petition for rehearing. Even with that, the Court allowed its decision to stand. That Court did not review the "pleadings, evidence, charge and other relevant matters" of the prior murder trial. That Court ignored the principle of collateral estoppel and instead based its judgment upon a concept of "mutuality" when it stated: (App. p. 9a)

> "The only question determined in the murder trial was whether Turner was guilty of murder. That question has now been adjudicated. But the question of whether he was guilty of robbery was not adjudicated in the first case, and under our statutes, could not have been determined. Murder and robbery cannot be joint together in one indictment. Ark. Stat. Ann. Sec. 43-1010 (Repl. 1964). In fact, there is no offense that can be jointly tried with murder, although that charge includes both first and second degree murder, and man-

> slaughter. Since Turner could not legally be tried for the offense of robbery at the same time he was being tried for murder (and was not so tierd), his acquittal on the murder charge certainly was not an adjudication of his guilt or innocence on the robbery charge."

This fallacious concept of "mutuality" is expressly overruled in *Ashe v. Swenson*, supra, at Page 443, and also in *Simpson v. Florida*, 403 U.S. 384, 91 S.Ct. 1801 (1971).

In that first appeal, the Supreme Court of Arkansas cites at length the case of *State v. Barton*, 5 Wash. 234, 105 P.2d 63 (1940) to support its decision. Those erroneous ideas of the Washington court about double jeopardy were corrected by this Court in the case of *Harris v. Washington*, 404 US 66, 92 S.Ct. 183 (1971).

This application of collateral estoppel to a felony murder situation is not novel to this petition. Prior to *Ashe v. Swenson*, supra, several states would not allow the later prosecution for the named felony after the prior acquittal of the felony murder, *Harris v. State*, 193 Ga 109, 175 SE2d 573, 147 ALR 980 (1941); *State v. Greely*, 30 NJ Super 542, 103 A2d 639, Affd on op below 31 NJ Super 542, 107 A2d 439 (1954); *People v. Cunningham*, 62 Misc 2d 515, 308 NYS2d 990 (March 1970). Some other states

did allow the second prosecution, *Duvall v. State*, 111 Ohio St. 657 146NE 90 (1924); *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963), *State v. Barton*, supra. See 9 ALR3d 254.

Since *Ashe v. Swenson*, supra, diligent research has uncovered only one such case other than the case of the Petitioner. In *Eagle v. Florida*, ___ Fla, ___ 249 So2d 460, (1971), the Court applied *Ashe v. Swenson*, supra, and refused the attempted second prosecution.

The State of Arkansas by the stipulation of record has admitted that the issue of guilt of robbery was determined in Petitioner's favor when he was found not guilty of murder while in perpetration of robbery (App. p. 14a). Therefore, under *Harris v. Washington*, supra, the constitutional guarantee applies and the robbery trial cannot be held.

A thorough review of the evidence and testimony of the murder trial reveals that Petitioner was found by a rational jury not to be criminally responsible for whatever crimes were committed upon the deceased that evening. Any other interpretation of the jury's finding is not supported by the proof. All of the evidence is that whoever killed the deceased also robbed him. Whoever robbed the de-

ceased also killed him. The same evidence and no more would be presented at the robbery trial. All of this is even stipulated by the State (App. p. 14a). Petitioner has once faced that evidence and been declared innocent. He cannot be made to face it again.

2. In the second appeal the Supreme Court of Arkansas had the full record of the murder trial before it plus the directions of this Court from *Ashe v. Swenson*, supra, to review that record. Again that Court defaulted in its duty. It held that the principle of "law of the case" prevented it from deciding Petitioner's appeal on its merits. This Court clearly has jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, *Urie v. Thompson*, 337 US 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 ALR2d (1949). This Court's right to re-examine such questions is not affected by this ruling that the first decision of the Supreme Court of Arkansas became the law of the case, *Davis v. O'Hara*, 266 US 314, 45 S.Ct. 104, 69 L.Ed. 303 (1924); *Reece v. Georgia*, 350 US 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955). See 1B Moore' Federal Practice, Paragraph 0.404 (10).

It is worth emphasizing again that the right

claimed here is based upon the federal constitution. The words of Mr. Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), are directly applicable: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." There is no question but that Petitioner has a federal right to have his case determined on its merits.

Most of the criminal law of this country is, and should be, enforced in the state courts. In the course of their discharge of this duty, those courts will inevitably be asked on many occasions to rule on claims of federal right. This Court obviously cannot superintend the manifold details of state criminal practice. But it can be alert to see that fairly presented federal claims are decided on their merits. Here, Petitioner's right to a state-court adjudication of the merits of his federal claim is at stake. This case thus presents a frequently recurring problem in the administration of criminal justice—a problem deserving of this Court's time and attention.

CONCLUSION

The writ of certiorari should be granted to review the judgment of the Supreme Court of Arkansas. On plenary consideration, that judgment should be reversed and the cause remanded for a new trial, or, in the alternative, the cause should be remanded to the Supreme Court of Arkansas with instructions to that court to decide Petitioner's federal claim on its merits.

Respectfully submitted,

BOYD TACKETT
421 Hickory
Texarkana, Arkansas 75501
ROYCE S. WEISENBERGER, JR.
501 East Sixth Street
Texarkana, Arkansas 75501
Attorneys for Petitioner

APPENDIX

INFORMATION

IN THE HEMPSTEAD COUNTY CIRCUIT COURT

THE STATE OF ARKANSAS

vs.

DENNIS TURNER

No. 5767

INFORMATION FOR FIRST DEGREE MURDER

I, W. F. Denman, Jr., PROSECUTING ATTORNEY WITHIN AND FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Hempstead County is a part, in the name and by the authority of the State of Arkansas, on oath accuse the defendant, Dennis Turner of the crime of First Degree Murder committed as follows, to-wit: The said Defendant on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully, wilfully, feloniously and violently take from the person of one Larry Wayne Yates, in the County aforesaid, a sum of money in excess of $300.00 in current and lawful money of the United States, forcibly and against the will of the said Larry Wayne Yates and by intimidating and putting fear in him the said Larry Wayne Yates, and while perpetrating said crime of robbery as aforesaid, feloniously, wil-

fully and with malice aforethought, and with premeditation and deliberation did kill and murder one Larry Wayne Yates, with a certain gun loaded with gunpowder and leaden bullets, and then and there held in the hands of the said Dennis Turner, from the effects of wounds so inflicted he the said Larry Wayne Yates died on the 25th of December, 1968, in violation of Ark. Stat. 41-2205, against the peace and dignity of the State of Arkansas.

W. F. DENMAN, JR., Prosecuting Attorney.

By: Norman M. Smith, Deputy P.A.

Subscribed and sworn to before me this 27th day of December, 1968.

Jim Cole, Circuit Clerk.

Admit to Bond in the Sum of $_____

By: Leona Cole, Deputy Circuit Clerk.

SUPREME COURT OF ARKANSAS

DENNIS TURNER,

Appellant

vs.

STATE OF ARKANSAS,

Appellee

No. 5488

Appeal from the Circuit Court of Hempstead County

Honorable W. H. Arnold, III, J.
Opinion Delivered March 30, 1970
Affirmed.

CARLETON HARRIS, Chief Justice

The issue in this case is whether appellant, Dennis Turner, who was tried and acquitted of first degree murder can now be charged and tried for robbery which arose out of the same act. The appellant was charged by the filing of an Information with "willfully, feloniously and violently taking from the person of Larry Wayne Yates, on the 25th day of December, 1968, a sum of money in excess of $300.00 in currency, forcibly and against the will of said Larry Wayne Yates, by intimidating and putting in fear the said Larry Wayne Yates and while perpetrating robbery, Defendant Dennis Turner did feloniously, willfully, and with malice aforethought, and with premeditation and deliberation, did kill and murder Larry Wayne Yates with a gun *** in violation of Arkansas Statute 41-2205."

Appellant was acquitted of murder by a jury on April 24, 1969, and was charged by a grand jury indictment on October 3, 1969, with the crime of robbery. The appellant sought dismissal of the indictment on the grounds that it constituted double

jeopardy, and *res judicata*. The Court denied appellant's motion to dismiss and granted him this appeal. For reversal appellant contends that the doctrine of double jeopardy and *res judicata* preclude a relitigation of the issue of robbery between the state and the appellant. Five points are asserted for reversal, but all relate to these two issue.

On appeal it is stipulated: "That the murder charge, of which Defendant Dennis Turner was acquitted, and the robbery charge arose out of the same set of facts, circumstances, and the same occasion.

"That the same testimony adduced by the State of Arkansas in the murder trial will necessarily need be reintroduced in this robbery charge."

The information accusing the appellant with murder was two-pronged: (1) that the murder was committed in perpetration of the crime of robbery and (2) that appellant committed the murder "feloniously, willfully, and with malice aforethought, and with premeditation and deliberation." This is permissible by Ark. Stat. Ann. Sec. 41-2205 (Rep. 1964) which is our felony-murder statue.

We disagree with appellant's contentions that the indictment should be dismissed on the principle of double jeopardy. This question was discussed in

the Washington case of *State v. Barton*, 105 P.2d 63, and also in the Idaho case of *State v. Hall*, 383 P.2d 602. Both Barton and Hall had been accused of murder in the first degree, it being alleged that each killed a person while engaged in the perpetration of the crime of robbery. In each instance, there was an acquittal on the charge of murder, and the defendants were subsequently charged with robbery. In rejecting the argument of double jeopardy in *Barton*, the Washington Supreme Court said:

> "Appellant contends that the offense of murder in the first degree, as charged in the information in the prior case, necessarily includes the offense of robbery; and that, therefore, this acquittal in that case operates as a bar to the information in the present case.
>
> "A person is not put in second jeopardy by successive trials unless they involve not only the *same act*, but also the *same offense*. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. The same act may be a violation of two difference penal statutes, in which case there may be two separate and successive prosecutions against the offender because the offenses are not the same."

Likewise, in holding against the contention of double jeopardy in *State v. Hall*, supra, the Supreme Court of Idaho said:

"The allegation that the homicide occurred in the perpetration of a felony, does not charge the accused with the commission of the felony referred to, nor make it an offense included in the murder charge; it merely characterizes the murder as to degree. ***

"The crime of murder may be committed without the commission of any of the felonies named in the statute, and the allegation that the homicide was committed while its perpetrators were engaged in a robbery does not charge that the robbery was the manner or means by which the murder was accomplished. The murder was charged to have been committed by means of a gun. The robbery was alleged only as a condition or circumstance characterizing the murder as first degree. The robbery was not an 'included offense' in the murder charge. It is clear from the statutory definitions, supra, that murder and robbery are separate, distinct and independent crimes. Neither is the 'same offense' as the other, within the constitutional provision against double jeopardy, and a prosecution for one does not bar a subsequent prosecution for the other on that ground. (Here, cases from thirteen states are cited.)"

The court then quoted from 22C.J.S., Criminal Law, Sec. 278, (1), Page 717, as follows:

"The test is the identity of the offenses, and not the identity of the occurrences or facts out of which they arise; it is not whether accused has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

It definitely appears that this is the rule followed by a great majority of the states.

Though Arkansas has no exact case in point, the case of *Binganan v. State*, 181 Ark 94, 24 S.W. 2d 969, is certainly analagous. There, Binganan was convicted for forging and uttering a check, but upon appeal to this court, upon confession of error by the Attorney General, the cause was reversed. Binganan was also indicted for obtaining money under false pretenses by the issuance of the same check. He pleaded his former acquittal. In rejecting this argument, we said:

> "Nor was the plea of former acquittal available to appellant. *It is true that he was convicted of the offense for the same act, that of issuing the check upon a bank in which he had never had an account and cashing it, upon which he was convicted (of) forging and uttering the same check as a forged instrument,* [1a] but he was not put in jeopardy a second time by this trial for the same offense, but for an altogether different one. *'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.'* [1b] (Citing cases.)"

So, though acquitted on the charge of forgery,

1a. Emphasis supplied.

1b. Emphasis supplied.

Binganan was then convicted of false pretenses, the offense being the writing of the same identical check, and the conviction being based upon the same proof used in the forgery case.

It will be noted that the test set out in *Binganan* is the identical test set out in the general rule heretofore cited. We find no merit in this contention.

Nor do we agree that the robbery indictment should be dismissed under the doctrine of *res judicata.*

There are no criminal cases in this state relative to the application of *res judicata,* but we have several civil cases, and the principle is, of course, the same. The doctrine of *res judicata,* is discussed in several Arkansas cases. In order to sustain a plea of *res judicata,* it must appear that the cause involves the same subject matter as that *determined* or which could have been determined in a former suit between the same parties. The bar of the former judgment extends to those questions of fact and law which were decided in the former action or which might have been but were not presented. See *Ozan Lumber Co. v. Tidwell,* 213 Ark. 751, 212 S.W. 2d 349; *Andrews v. Victor Metal Products Corp.,* 235 Ark. 568, 361 S.W.2d 19.

"'"It is undoubtedly settled law that a

> judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. *But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.*[2] If there be any uncertainty on this head in the record —as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.***"

Applying the language quoted to the case before us, it is at once apparent that *res judicata* is not applicable. The only question determined in the murder trial was whether Turner was guilty of murder. That question has now been adjudicated. But the question of whether he was guilty of robbery was adjudicated in the first case, and under our statutes, could not have been determined. Murder and robbery cannot be joined together in one indictment. Ark. Stat. Ann. Sec. 43-1010 (Repl. 1964).

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2. Emphasis supplied.

In fact, there is no offense that can be jointly tried with murder, although that charge includes both first and second degree murder, and manslaughter. Since Turner could not legally be tried for the offense of robbery at the same time he was being tried for murder (and was not so tried), his acquittal on the murder charge certainly was not an adjudication of his guilt or innocence on the robbery charge. This question was likewise discussed in the Washington case of *State v. Barton*, supra, and also in the Idaho case of *State v. Hall*, supra. On the question of *res judicata*, the Washington court said:

> "The doctrine of res judicata, as distinguished from second jeopardy, does, as appellant asserts, apply to criminal actions as well as to civil causes; but it is subject to the same limitations. One such limitation is stated in 34 C.J. 969, Sec. 1386, as follows: 'The rule as to the conclusiveness of a judgment in a criminal case is subject to the same exceptions and limitations as those which pertain to judgments in civil actions.***'
>
> "*** It is not possible to determine whether the jurors returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the state's evidence insufficient as to one or more essential elements of the offense charged. They could have utterly disregarded all of the testimony adduced by the appellant in his defense and yet have returned a verdict of not guilty.

> The verdict and the judgment based thereon were not, therefore, res judicata as to appellant's alibi, nor as to any other particular fact. They were res judicata only as to the ultimate fact that appellant was not guilty of the crime of which he was accused."

The court held that Barton's acquittal on the murder charge did not prevent his being tried on the robbery charge.

In *State v. Hall*, supra,[3] the court stated that, though Hall was acquitted of the charge of murder, the issue was never joined between the state and defendant on the charge of robbery as such, and the defendant could not have been convicted or robbery under that information. It was pointed out that the jury could have found the defendant not guilty of murder, even though the jury might have believed he was a party to the robbery.

How can *res judicata* apply to the robbery charge against Turner, because of his acquittal in the murder case, when the offense charged on that occasion was not robbery—but murder,—and when he could not have even been legally tried for robbery in the same indictment?

---

3. The Idaho statute relative to murder perpetrated while committing a felony, is almost identical with our own.

From what has been said, it is apparent that we do not agree with appellant's contentions; and we hold that the trial court did not err in refusing to dismiss the robbery indictment against appellant.

Affirmed.

Fogleman, J., concurrs; George Rose Smith, Byrd and Holt, JJ, dissent.

In the Circuit Court of Hempstead County, Arkansas
No. 5817

THE STATE OF ARKANSAS,
Plaintiff

vs.

DENNIS TURNER,
Defendant

In The Supreme Court of Arkansas
Criminal No. 5618

DENNIS TURNER,
Appellant

vs.

THE STATE OF ARKANSAS,
Appellee

AMENDED STIPULATION

The State of Arkansas, Plaintiff in the lower Court and Appellee in the Supreme Court, by and through the Presecuting Attorney for the Eighth Judicial Circuit of the State of Arkansas, of which Hempstead County is a part, W. H. Arnold, and the Defendant, Dennis Turner, by and through his retained attorney, Boyd Tackett, do hereby further stipulate:

That the evidence adduced by and on behalf of the State in Hempstead County Circuit Court Case No. 5767 (Murder while committing Robbery), upon which charge Dennis Turner was found not guilty, constitutes all of the evidence that can be utilized by and on behalf of the State in Hempstead County Circuit Court case No. 5717 and Arkansas Supreme Court Case No. 5618 (Robbery while committing Murder).

That the pleadings, evidence, proceedings, judgment, and Stipulations entered into by and between the parties and attorneys in Hempstead County Circuit Court Case No. 5767 (Murder while committing Robbery) should be considered a part of the Record in the instant case—Hempstead County Circuit Court Case No. 5817 and Arkansas Supreme Court

Case No. 5618 (Robbery while committing Murder).

That whoever (one or more people) killed Larry Wayne Yates on or about the 25th day of December, 1968, in Hempstead County, Arkansas, also robbed Larry Wayne Yates at the same time and place and on the same occasion; that whoever (one or more people) robbed Larry Wayne Yates on or about said date in said county and state also killed Larry Wayne Yates at the same time and place and on the same occasion; that if Defendant Dennis Turner killed or participated in the killing of Larry Wayne Yates he also robbed or participated in the robbing of Larry Wayne Yates; that if Defendant Dennis Turner robbed or participated in the robbing of Larry Wayne Yates he also killed or participated in the killing of Larry Wayne Yates; that if Defendant Dennis Turner did not kill or participate in the killing of Larry Wayne Yates he did not rob or participate in the robbing of Larry Wayne Yates; and that if Defendant Dennis Turner did not rob or participate in the robbing of Larry Wayne Yates he did not kill or participate in the killing of Larry Wayne Yates.

That the same testimony adduced by and on behalf of the State of Arkansas in the murder case

against Dennis Turner will necessarily be reintroduced in the robbery charge against Dennis Turner; and that there will be no additional testimony introduced by and on behalf of the State of Arkansas in the robbery charge than has been introduced in the murder case.

THE STATE OF ARKANSAS, *Plaintiff*
By: W. H. ARNOLD
Prosecuting Attorney
Eighth Judicial Circuit
State of Arkansas

DEFENDANT DENNIS TURNER
By: BOYD TACKETT
Defense Attorney
TACKETT, MOORE, DOWD & HARRELSON
5th & Hickory Sts. - P.O. Box 2631
Texarkan, Arkansas 75501

INDICTMENT

THE STATE OF ARKANSAS

VS.

DENNIS TURNER

In Hempstead County Circuit Court, April, 1969
Indictment for Robbery

The Grand Jury of Hempstead County, in the

name and by the authority of the State of Arkansas, on oath, accuse the defendant, Dennis Turner of the crime of robbery committed as follows, to-wit: The said defendant on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully take from Larry Yates by force and intimidation lawful currency in the amount of Four Hundred Dollars ($400.00) belonging to the said Larry Yates, against the peace and dignity of the State of Arkansas.

Admit to bond in the sum of $2,500.00

W. H. "DUB" ARNOLD
Prosecuting Attorney, Eighth

/s/ Signature
Foreman of the Grand Jury

SUPREME COURT OF ARKANSAS

DENNIS TURNER,
Appellant

V.

THE STATE OF ARKANSAS
Appellee

No. 5618

Appeal From Hempstead Circuit Court
JOHN W. GOODSON, *Judge*
Opinion Delivered Nov. 29, 1971

Rehearing denied January 10, 1972

AFFIRMED

JOHN A. FOGLEMAN, *Justice*

This is the second time Dennis Turner has appealed from an order denying his motion to dismiss an indictment for robbery of Larry Wayne Yates. In both motions he asserted that he was entitled to a dismissal of the indictment because he had been acquitted of the murder of Yates while perpetrating the very robbery with which he was charged in the indictment he seeks to have dismissed. The first motion was based upon a plea of double jeopardy and res judicata. It was denied and we affirmed. *Turner v. State*, 248 Ark. 367, 452 S.W.2d 317. The second motion was then filed. In it appellant also pleaded double jeopardy and res judicata. It was also denied and this appeal resulted. The majority of the court feels that the order denying the motion is an appealable order. We affirm because our decision on the prior appeal is the law of the case.

Appellant admits that the only difference in the record from that presented on the first appeal is that the complete transcript of the record of the trial on the murder charge is now before us. It is accompanied by a stipulation of the prosecuting at-

torney that the evidence that will be presented on the robbery charge is the identical evidence that was presented in the murder trial. Appellant argues that under the doctrine of collateral estoppel his trial for robbery after the acquittal of murder is violative of the double jeopardy provisions of the state and federal constitutions, relying upon the decision in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2nd 469 (1970), decided seven days after our opinion on the first appeal was handed down. There the United States Supreme Court said that acquittal of Ashe of the robbery of one of six persons he was charged with having robbed simultaneously could not have been based upon anything other than a finding that Ashe had not been one of the robbers who perpetrated the crime. It then voided Ashe's conviction of the robbery of a second victim, holding that the second trial constituted double jeopardy. This holding was based upon the principle that the determination of the ultimate issue in the first trial—whether Ashe was one of the robbers—forever barred the parties, i.e., the state and the defendant, from ever litigating the same issue again under the doctrine of collateral estoppel.

We need not ponder over the application of the rule of *Ashe* to the facts of this case. The doctrine

of "law of the case" is a fundamental essential of any system of justice which permits appeals from trial court action. Without it, termination of litigation would depend upon exhaution either of the resources of the unsuccessful party or of the resourcefulness of his counsel. See *Porter v. Doe*, 10 Ark. 186; *Miller Lumber Co. v. Floyd*, 169 Ark. 473, 275 S.W. 741, Aff'd 273 U.S. 672, 47 S.Ct. 475, 71 L. Ed. 833 (1927). The application of the doctrine to criminal cases is well established. *Bowman v. State*, 93 Ark. 168, 129 S.W. 80; *Mode v. State*, 234 Ark. 46, 350 S.W.2d 675, cert. denied, 370 U.S. 909, 82 S.Ct. 1255, 8 L.Ed.2d 403 (1962). See also, *Clark v. State*, 246 Ark. 876, 440 S.W.2d 205; *Fuller and Walton v. State*, 246 Ark. 704, 439 S.W.2d 801, cert. denied, 396 U.S. 930, 90 S.Ct. 260, 24 L.Ed.2d 228 (1969). It requires that a party assert whatever objections that he may have to any step in a proceeding in a trial court prior to appeal from an adverse ruling. A decision on appeal on any question there presented forecloses further consideration of that question in subsequent proceedings in the same case, even though the argument made or ground of objection relied upon a second appeal is not identical with the argument made or ground asserted on the first appeal, if the new argument or objection could have been

urged on the first appeal. *St. Louis Southwestern Railway Co. v. Jackson*, 246 Ark. 268, 438 S.W.2d 41; *Moore, Admx. v. Robertson*, 244 Ark. 837, 427 S.W.2d 796.

The rationale of *Ashe* is that "collateral estoppel" is encompassed within the ambit of double jeopardy constitutional prohibitions. See also, *De Sacia v. State*, 469 P.2d 369 (Alaska 1970; *State v. Hite*, 3 Wash. App. 9, 472 P.2d 600 (1970). The terms "collateral estoppel" and "res judicata" are often used interchangeably in criminal cases. *De Sacia v. State*, supra. The former has been considered an aspect of the latter. *Hoag v. New Jersey*, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958), reh. denied, 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958). See 46 Am. Jur. 2d 565, Judgments Sec. 397; Stone, Res Judicata in Criminal Cases, 27 Texas Law Review 231 (1948). Because "collateral estoppel" is included in both concepts relied upon by the appelalnt in both motions, there can be no doubt that the decision on the first appeal governs this appeal as the law of the case.

The fact that *Ashe v. Swenson* was decided by the United States Supreme Court after our opinion was rendered on the first appeal makes the doctrine

of "law of the case" no less applicable, even if it might be under circumstances other than those existing in this case. Appellant filed a timely petition for rehearing after the *Ashe* decision based substantially on that holding. We denied that petition with full appreciation of all the implications of *Ashe*.

Nor does the addition of the transcript of the record of the murder trial militate against the application of the rule. No reason appears for its not having been presented at the hearing on the first motion to dismiss.

We are aware of the decision of the United States Supreme Court in *Harris v. Washington*, No. 70-5213, decided November 16, 1971. This decision does nothing more than apply *Ashe* to a factual situation virtually identical with that in *Ashe*. That decision would not affect the application of the "law of the case."

The judgment is affirmed.

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IN THE

Supreme Court Of The United States

October Term, 1971

No. 71-1309

DENNIS TURNER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REASONS FOR DENYING THE WRIT

On December 27, 1968, petitioner was charged with Murder in perpetration of robbery. Upon trial on these charges petitioner was found not guilty by a jury. On October 3, 1969, a Grand Jury returned an indictment against petitioner charging the crime of robbery, petitioner pled former jeopardy.

Petitioner relies entirely upon the principle enunciated by this Court in *Ashe v. Swenson*, 397 U.S. 436, as follows:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a

prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

It is the position of respondent that an examination of the pleadings, evidence and charge in this case does not give rise to an "ultimate" issue on which the jury grounded its verdict and which petitioner now seeks to foreclose from consideration. In this connection respondent makes the testimony of Richard Turner (evidence) an exhibit to its response as Appendix A and instructions by the Court at the murder trial (charge) relative to degrees of murder; defining accomplice and what weight is to be given to testimony of an accomplice as an exhibit as Appendix B.

The trial court charged the jury as to the different degrees of homicide included in the first degree murder charge lodged against petitioner (Inst. No. 11, See App. B). The jury was charged as to felony murder, with the felony of robbery defined, murder in the first degree and murder in the second degree. With regard to felony murder and murder in the first degree the Court charged:

> A specific intent to kill, premeditation, and deliberation are not elements of first degree murder in the perpetration of robbery.
>
> To make it clear to you, if the killing is unlawful and done with malice aforethought, and nothing more is proved, it is murder in the second degree. If, in addition to that, there was a specific intent to kill and premeditation and deliberation, or a killing in the perpetration of robbery, it would be murder in the

first degree. There can be no murder without malice, either first or second degree.

The jury was told that petitioner could be convicted of murder in the first degree if he killed with a specific intent, premeditation and deliberation *or* killed in the perpetration of robbery.

In Instruction No. 19 (App. B) the trial court told the jury it could find petitioner guilty of murder in the first degree if it found that he willfully and maliciously shot Larry Wayne Yates while perpetrating a robbery *or* if he killed Larry Wayne Yates willfully and maliciously after premeditation and deliberation.

As can be seen the issue of murder was presented to the jury both as a premeditated murder and as a felony murder committed in the perpetration of robbery. Inherent in this is the possibility that the jury could find that the murder and robbery took place separately. The jury could have found that petitioner killed while robbing, killed but not during the course of a robbery, or didn't kill. In order for an ultimate issue to be presented herein the charges would have had to have been such that the commission of the robbery and murder occurred together. This is not the case.

The defense of petitioner was largely that someone else committed the murder or that they were accomplices of petitioner who were not charged and were testifying against petitioner. (See cross examination App. A). Instructions were given on accomplices and the weight to be given their testimony (See App. B). The evidence in this case is such that a jury could have found that the murder and robbery occurred at separate times and that petitioner

did not do the murder without having to decide if he did the murder *and* robbery.

The evidence reflects that the victim left the poker game in the company of Dennis Turner *and* Richard Turner (R. 50); that a pistol belonging to Richard Turner was given to Dennis Turner; that both Dennis Turner and Richard Turner thereafter had possession of the pistol (the murder weapon R. 212, 213) at different times; (App. A direct examination) that the expended pistol shells were found at the apartment of *Richard Turner* (R. 344, 345) while the money of Larry Wayne Yates and the murder weapon were later found in the closet of Dennis Turner. (R. 338-340) Both Dennis Turner and Richard Turner were at the scene where the body of Larry Yates was found. Both were in the victim's car at different times when the victim was not present after leaving the poker game. (App. A direct examination)

The respondent would present the following as a set of facts which the jury could have believed with the result that Dennis Turner was acquitted of murder without having to determine if he had also robbed.

Dennis Turner, Richard Turner and Larry Yates drive to Richard Turner's apartment at 4:00 a.m. in Yates' car leaving Dennis Turner's car at the place where the poker game went on. (R. 50 and App. A) Dennis Turner took Richard Turner's pistol, took Yates into the country where he robbed him, Dennis Turner then drove back to Richard Turner's apartment arriving at about 5:00 a.m., Richard Turner took the pistol from Dennis Turner, left with Dennis Turner in the victim's car located the victim and killed him without Dennis Turner taking part in the killing. The victim's car was then hidden and Dennis Turner

went home taking both the pistol and money with Richard Turner refusing to have anything further to do with either item. (App. A) This would assume that Dennis Turner and Richard Turner were accomplices as far as the robbery was concerned but that Dennis did not kill Yates while Richard Turner did to keep Yates from exposing both of them. It is submitted that the jury could have determined that the above or other sets of facts could have occurred. Dennis Turner, under the facts in this case could have committed robbery without committing murder. No ultimate issue is presented to the jury in this case by the charge of the trial court and the evidence and this being the case *Ashe v. Swenson, supra,* does not apply. It is submitted that from the facts herein a jury could find that Richard Turner committed robbery and murder; committed neither or committed either or that petitioner committed murder and robbery, committed either or committed neither. A jury found that Dennis Turner did not commit murder, it did not by its verdict necessarily have to find that neither did he commit robbery although another jury may very well find that he did not once this case is presented on the charge of robbery. It is respectfully submitted that under the facts herein petitioner is not entitled to the relief afforded by double jeopardy and that his petition should be denied.

CONCLUSION

That the writ prayed for herein be denied.

Respectfully submitted,

RAY THORNTON
Attorney General

HENRY GINGER
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent

THE COURT: All right. Let's take a ten-minute recess.

After a ten-minute recess, court was duly reconvened, and the following proceedings were had and done:

MR. ARNOLD: Ready, Your Honor?

THE COURT: Yes, sir.

RICHARD TURNER,

being called as a witness in behalf of the State of Arkansas, and after having first been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ARNOLD:

Q. State your name.

A. Richard Turner.

Q. Richard, speak up so the last man in the jury can hear you. How old are you?

A. Twenty-two.

Q. Where do you live?

A. Route 1, Fulton.

Q. Are you married?

A. Yes, I am.

Q. Who are you married to?

A. Jo Turner.

Q. Have you been married before?

A. Yes, sir.

Q. How many children do you have?

A. One.

Q. By this prior marriage?

A. Yes, sir.

Q. When did you marry Jo Mealer?

A. February 11th.

Q. Of this year?

A. Yes, sir.

Q. What is your occupation?

A. I run a service station for my dad.

Q. Here in Hope?

A. Yes, sir.

Q. Now, suppose I call your attention to December 24, 1968, it was Christmas Eve — what did you do on the morning of that day?

A. I got ready to go to Rogers, Arkansas.

Q. Did you, in fact, go to Rogers?

A. Yes, I went to Rogers to pick up a dog for Jamie Russell.

Q. Who went with you?

A. William Waller.

Q. Where does he live?

A. He lives over by Brookwood School.

Q. Does he live here at Hope?

A. Yes, sir.

Q. Did just the two of you make this trip?

A. Yes, sir.

Q. How did you go up there?

A. We went in a yellow Rambler, '67 model.

Q. Who owned this car?

A. My father.

Q. Did you just use it?

A. Yes, sir, he — I didn't have a car at the time, and he let me use it to go up there.

Q. All right. What time did you return to Hope?

A. I got back in Hope a little after 10:30, I believe, right around in there. I took William home and went over and picked up Jo, and took Jamie Russell's dog to him.

Q. You picked up Jo and took the dog —

A. Yes, sir.

Q. — to who?

A. Jamie Russell.

Q. He lives here at Hope?

A. He lives out on Highway No. 4.

Q. What did you do after you left this dog over there?

A. Jo told me that there was word left from Johnny to come over and play cards at his house.

Q. Did you go over there?

A. Sir?

Q. Did you go over there?

A. Yes, sir.

Q. Who went?

A. Jo went with me over there.

Q. What kind of a vehicle were you driving when you went over there?

A. That Rambler — '67 Rambler.

Q. Do you know about what time you got over there?

A. It was a little after 11 when we got there.

Q. Where does Johnny Mitchell live — or where did he live at that time?

A. He lives in an apartment on East Third Street.

Q. Is that over near the ice plant?

A. Yes, sir.

Q. Who was there when you got there?

A. Johnny, and Larry Yates, and Dennis, Jackie Hurst, and Johnny's wife.

Q. And what were they doing?

A. Playing cards.

Q. Where were they playing?

A. In the kitchen.

Q. How many rooms are in this apartment?

A. Three rooms.

Q. What are they?

A. Kitchen, living room, and bedroom.

Q. Where is the bedroom located?

A. Between the living room and kitchen.

Q. Which door did you enter?

A. Came in the back door.

Q. And what did — excuse me.

A. — the kitchen door.

Q. What did you do as you walked in?

A. I got a chair and started playing cards with them.

Q. What kind of cards were they playing?

A. Playing poker.

Q. Do you recall what the limits were to the game?

A. I think they were 50 cents — 25 cent ante and 50 cent limit.

Q. What did Jo and Sandra Mitchell do?

A. They watched us play cards a little while, and then went into the bedroom.

Q. Was there any drinking going on over there?

A. There was a little — not much — well, there wasn't much after I got there.

Q. Did you carry anything over there to drink?

A. Yes, sir I had — I think I had three beers.

Q. Did you drink any of those?

A. I drank one.

Q. Do you know who drank the others?

A. Nobody drank a full one. I drank that one, and opened another one and gave Dennis part of it, but I don't know whether he drank it or not.

Q. Any whiskey over there?

A. Yes, there was a fifth of whiskey.

Q. Do you know who all was drinking it?

A. Dennis, and myself, and Johnny — and I couldn't tell you — I don't know whether Jackie was or not.

Q. Did anyone get drunk?

A. No, sir.

Q. How long did Jo Mealer stay?

A. She stayed until somewhere around two — I don't know what time it was — right around two, and then she went home.

Q. Where did she go?

A. She went home, I guess.

Q. Where is her home; where was it at that time?

A. 804 South Grady.

Q. How did she go?

A. In the Rambler that we were driving.

Q. How long did you stay?

A. I stayed and played cards up till around 4 o'clock that morning.

Q. Then did all of you quit at the same time?

A. No, sir, Johnny Mitchell quit first, and we played a little while longer, then Dennis quit, and then we played — Larry, Jackie, and myself played until about 4.

Q. How long have you known Dennis Turner?

A. Six or eight years, I guess.

Q. Have you ever seen him drunk?

A. Yes, sir.

Q. How was Dennis acting on this particular occasion?

A. He didn't act drunk; he just acted serious — normal — there wasn't any hollering or screaming going on.

Q. Did anybody have any fights or anything over there?

A. No, sir.

Q. Did you see any bills of large denomination in that poker game?

A. One.

Q. What was that?

A. A hundred dollar bill.

Q. When did you see it?

A. Larry . . . right before the game broke up, Larry got change for it from Jackie.

Q. Who did?

A. Larry Yates.

Q. Got change from whom?

A. Jackie Hurst.

Q. Did you win any money in that poker game?

A. Yes, sir.

Q. How much did you win?

A. $40 or $50, I guess.

Q. Who lost?

A. Johnny lost, I believe — I don't really know — just guessing, $20 to $50. And Larry lost, I'd say, around $30 after I got there, and Dennis lost, I believe, lost $10.

Q. What about Jackie?

A. He won.

Q. Was he the big winner?

A. I believe; he won more than I did.

Q. Now, you say the game broke up around 4 o'clock?

A. Yes, sir.

Q. What did you do when the game broke up?

A. After the game broke up, Larry mentioned something about going to eat, and they asked me if I wanted to go and I told them, "No".

Q. Who asked you?

A. Larry did, and I told him, "No, just take me home". And Jo had already left in my car and I didn't have a way, and they took me home to South Grady.

Q. Excuse me.

A. It was Larry, Dennis, and I. Dennis rode with Larry. And they were going to eat, I guess.

Q. Whose car was it?

A. Larry's car.

Q. Now, as you left, how were you seated in the vehicle?

A. I was sitting in the middle, Larry was driving, and Dennis sat on the outside.

Q. All in the front seat?

A. Yes, sir.

Q. And where did you go from Johnny's?

A. They took me to my house.

Q. Where were you living?

A. I was staying over at 804 South Grady right then.

Q. Living with Jo Mealer?

A. Yes, sir.

Q. What happened when you got over to the apartment there?

A. They took me over there and Larry pulled into the front driveway. Dennis opened the door and and he was going to let me out, and he asked, "Do you want to go to Perrytown and eat with us"? And I said, "No, I want to go to bed". And he opened the door and let me out, and I started walking up to the house and he followed me up there. When we got to the house, he asked me if he could borrow my gun, and I asked him, "Why"? He said, "Oh, I just might need it after a while". So we went inside and I started to get my gun, and Jo had it under — it wasn't by the bed, I guess it was under the bed — and I asked her where it was and she handed it to me, and I handed it to Dennis, and he left then, and —

Q. Let me ask you this: Did Dennis Turner ever borrow that gun before?

A. He has used that pistol; he has never borrowed it to take with him, but he's used some of my shotguns.

Q. All right. What happened then after he left?

A. Well, he left then with Larry, and I went to bed. And about, I guess, about an hour or so later, he came back and knocked on the door. I went and opened the door and let him in, and he said, "I need to talk to you." I said, "What about"? He said, "I can't talk to you around Jo; come on and go with me". So I went in there and started getting my clothes on, and he asked me if I had any more shells. Well, I didn't think anything about it, so I took the gun and ejected the hulls out of it and threw them in my closet and loaded the gun back up. I don't know if I handed the gun back to him or laid it on the dresser, but he had the gun when we left. So we went outside and started to get in the car, and he said, "Watch it, you may get some blood on you". Well, I didn't know what he was talking about; I just wondered. It was the first time I had thought anything about it until then, and he started driving off and I asked him where Larry was, and he said, "He's out at Rocky Mound".

Q. Whose car were you in?

A. Larry Yates'. So he started driving out to Rocky Mound. When we got — I don't know, about a mile from there, he told me he had got his money. He told me, he said, "Well, I killed him. It didn't work out the way I planned it". And, of course, I didn't believe him then, and then we turned on in the road, and he said he was going to show me. We started driving up the

road — a gravel road then we were on — and he told me, he said, "I didn't mean to do it; I didn't mean to kill him. The gun just went off, and" he said, "I shot him. I asked him for his money and he wouldn't give it to me, and," he said, "the gun just went off." He said, "He got out and started running, and I just started shooting".

And he pulled up — he pulled right past the body — I could see it lying on the side of the road. He pulled up right past the body, and he said, "Don't get out; I don't want you to see what I've done". And I sat in the car, and he walked back there for just a minute or so, and he came back and got in the car. We drove on then toward Rocky Mound.

Q. All right. Where is — there where he showed you the body — where is this located from Hope?

A. Out on No. 4 Highway. It's between — it's the cut-off road from No. 4 to Rocky Mound.

Q. Does that road have a name?

A. Well, the place where he shot him at we call Hootowl Hill; I don't know what the name of the road is.

Q. Is that in Hempstead County, Arkansas?

A. Yes, sir.

Q. All right, then what happened?

A. As we were driving back — he was just kind of mumbling to himself, he didn't — well, he didn't make any — I don't know, he was just talking. And he said he had to get rid of the car. I agreed with him. Of course, anybody would. I mean he had killed one boy. And we drove on into town and he said, "Well, I'm

going to take the car and hide it". So we drove into town, and he stopped over at Johnny's house — that's where he left his car. So I got out and got in his car and followed him. He went down behind the brick yard and circled the block two or three times there — and I couldn't figure that out, either — and then he went on from there out on Old Highway 67. He parked the car and I pulled up beside him; it was dark, but it looked like he was wiping fingerprints off the car with a dark coat or a sweater, or something. And then he got in the car with me and we drove on back home, drove up to my house, and he let me out — Well, I got out; I was driving — drove up to my house, and I got out and he scooted over on the driver's side. He asked me, said, "Do you want any of the money"? He said, "There was more than I thought it was". I told him no, I didn't want any of the money. He said, "Well, here's your gun". I said, "I don't want the gun, either; take it and do what you want with it". I didn't want the gun at all. And then he drove off, and I thought he was going home, but then Johnny came over a little while later. I went inside of the house and we was trying to think what to do, and then Johnny pulled up outside a few minutes later. And we talked about a few minutes, and that's when we decided to go tell Mr. Ward.

Q. Why did you go to Sgt. Ward?

A. He is the investigator around here.

Q. How did you go? Just . . .

A. No, Johnny and Jackie came over in Jackie's mother's car — well, it's Johnny's mother, too — and then

Johnny and I went and got in his truck, and drove from there out to Mr. Ward's house.

Q. Did you tell Sgt. Ward what happened?

A. Yes, sir.

Q. What happened then?

A. I took Mr. Ward and Herbert Griffin out to where the body was. And then . . . well, we went out there, and they sent for an ambulance and everything.

Q. What happened then?

A. Uh, we came back home. I don't remember exactly how it went then, whether I came home first, or later. And then he took us and we gave him our testimony. We told him everything that happened.

Q. Did you tell him what you have told us here today?

A. Yes, sir.

Q. Richard . . .

MR. ARNOLD: Pass the witness.

CROSS EXAMINATION

BY MR. TACKETT:

Q. You say you told Mr. Ward on a Christmas morning what you have told this jury today?

A. Yes, sir.

Q. Did you put it on a tape recording?

A. Yes, I believe we did. Yes, sir, we did.

Q. You don't mind us having that, do you?

A. No, sir.

Q. All right. How old are you?

A. Twenty-two.

Q. When did you marry Jo Turner?

A. February 11th, 1969.

Q. Was that because that . . . on account of this deal whereby you might be charged with murder, and you didn't want her to testify against you?

A. No, sir, it was not.

Q. How long did you live with her before you married her?

A. On and off for six or eight months.

Q. Why did you finally make up your mind to marry her?

A. Because I finally got a divorce.

Q. When did you get your divorce?

A. It was right after the first of January.

Q. Right at the first of January?

A. Yes, sir, I believe so.

Q. Did you get it here?

A. Yes, sir.

Q. All right. Now, what automobile did you drive up in Arkansas on Christmas Eve day to get a dog?

A. A 1967 yellow Rambler.

Q. What?

A. A 1967 yellow Rambler.

Q. Yellow Rambler. Now, who represented you in the divorce case?

A. In the divorce case?

Q. Yes, sir.

A. John Wilson.

Q. John Wilson. Have you ever had any other litigation where you have employed an attorney?

A. Yes, sir.

Q. What was that?

A. A cattle thing that happened.

Q. Who represented you in that?

A. Mr. Chuck Honey.

Q. When did you hire Chuck?

A. I don't know. My father did.

Q. That was because he was a member of the Legislature, wasn't it?

A. I don't know, sir.

Q. That was to try to get that case put off, wasn't it?

A. I don't know. You will have to ask him.

THE COURT: Just a moment:

MR. ARNOLD: He said he didn't know.

THE COURT: This is proper cross examination. It will be overruled, sir.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. Now, you were charged with stealing cows from Mr.

G. W. Holliday in this courthouse on the 16th day of August, 1968, weren't you?

A. Yes, sir, I believe so.

Q. And the legislature hasn't been in session all that time, has it?

A. I don't know.

Q. But you haven't been tried, have you?

A. No, sir.

Q. I will ask you if the last time there was a possibility of it coming up in this court, if Travis Ward did not stash you and Johnny Mitchell at a certain place, and then he came down there and said, "Well, that old man is raising sand about us not putting us up for trial". Do you remember that?

A. No, sir.

Q. You don't remember that. He didn't do it, did he?

A. Would you repeat the question again, please?

Q. Did Travis Ward, on the day that they was having pre-trial here, and getting cases set for trial — the last term of this court — didn't Travis Ward come to you and Johnny and in the presence of others say, "That old man (Talking about G. W. Holliday) is raising sand up there to get you tried"?

A. No, sir.

Q. "And I don't think we'll get it put off again"?

A. No, sir.

Q. In September of 1968 — remember that? September term of this court — remember that?

A. No, sir.

Q. Did you go with your father and Travis Ward to pay off Mr. Holliday for the injuries to the cattle you stole?

A. No, sir.

Q. You didn't go with them?

A. No, sir.

Q. Do you know what they paid him?

A. No, sir.

Q. Do you know the old man was kind enough to give them $15 back?

A. No, sir.

Q. But you still have not been tried on this charge, have you?

A. No, sir.

Q. Travis Ward investigated that one, too, didn't he?

A. He and Scrub Mosier, I believe.

Q. Scrub Mosier didn't go up there to give Holliday any money, did he?

A. I don't know.

Q. Never even left town — oh, yes, I want to ask you about something — who went with you to get that dog?

A. William Waller.

Q. How old is William?

A. Twenty, I believe.

Q. And you went with William up in Indiana, didn't you?

A. Yes, sir.

Q. And you were convicted up there for messing with a girl, wasn't you?

A. I wasn't convicted for messing with a girl.

Q. You were convicted, weren't you?

A. Yes, sir.

Q. Contributing to the delinquency of a minor, wasn't it?

A. Yes, sir.

Q. Served some time in the jail, didn't you?

A. Yes, sir.

Q. And you threw most of that off on the Waller boy, and he had to serve twice as long as you did, didn't he?

A. No, sir.

Q. He didn't serve twice as long as you did?

A. Yes, sir.

Q. He did, did he? Didn't you tell Waller, "Well, I'm a married boy — man, and you are just a kid and got no responsibilities, it's best to let you take all the blame". Do you deny that?

A. No, sir, that's not what happened.

Q. But they stuck you, anyhow, didn't they?

A. Yes, sir.

Q. You didn't have anybody up there to help you, did you?

A. No, sir.

Q. Where is that yellow car?

A. A man bought it that lives on Elm Street.

Q. Is it still here in town?

A. Yes, sir.

Q. Have you looked at it to see if you got all the blood off of it, or not?

A. I didn't have any blood on it.

Q. Where did you get blood on your clothes that you were telling others about on Christmas Day?

A. I didn't tell anyone I had blood on my clothes on Christmas Day.

Q. You didn't tell them that you had blood on your clothes?

A. No, sir.

Q. I don't guess you told Nora Dugan that she was the only one that could save your life, did you?

A. I didn't say it in those words.

Q. And what did you say?

A. I told her it would help when she gave her testimony because she was there, and she knew I was there.

Q. Didn't you say, "Nora —"

A. Sir?

Q. Didn't you say, "Nora, if you can't keep me at that house from 4 to 6 o'clock in the morning, I'm a gonner"?

A. No, sir.

Q. Didn't you say, "Nora, you are the only one that can save my life." right out there in the middle of the street? Didn't you say that?

A. No, sir.

Q. What did you chase her down in that automobile to talk to her about?

A. To tell her that she had been subpoenaed.

Q. Well, she knew she had been subpoenaed, and was on her way to the prosecuting attorney's office, wasn't she?

A. She said something like that.

Q. You told her, "Now, Nora, don't let me down," now didn't you?

A. I didn't say that.

Q. "I have got to be in there with Jo from 4 to 6 o'clock in the morning".

A. No, sir.

Q. You got married to Jo to be sure you were showing her you were going to do right, didn't you?

A. No, sir.

Q. If those girls were to tell the truth, you weren't there one minute before 6 o'clock, were you? You was out there taking care of Larry and getting his money from him?

A. No, sir.

Q. I'll ask you this: Were your fingerprints ever taken to see whether or not your prints was on the pistol — have they, during this investigation, ever taken your fingerprints?

A. I believe they have.

Q. Well, where was it, please, sir?

A. No, that was on the other thing.

Q. Uh-huh, but I'm talking about this case.

A. I don't remember.

Q. Do you know whether or not fingerprints were ever taken of that defendant over there, to see whether or not he had ever touched that pistol?

A. I don't know.

Q. Were there any tests made of your hands to determine whether or not you had recently fired a pistol?

A. No, sir.

Q. But you were down there at Travis Ward's, knocking on his door at good daylight, weren't you?

A. Yes, sir.

Q. When did your dad get there?

A. A while later.

Q. How long later?

A. I don't remember.

Q. When you walked in, did you call your dad, or did Travis call your dad?

A. I don't remember — I didn't call him; I don't know whether he did or not.

Q. All right, you are 22 years old, aren't you?

A. Yes, sir.

Q. Johnny Mitchell is 25 years of age, isn't he?

A. Yes, sir.

Q. Travis Ward is calling the parents of these people that are involved, isn't he? Calling your parents, isn't he?

A. I don't know whether he did, or not.

Q. You don't know whether your dad came over there?

A. Well, he came out there, but I don't know that he called.

Q. Well, who was there besides you and Jimmy, and Travis?

A. Well, his son was there.

Q. How old is his son?

A. I don't have any idea.

Q. Well, about how old is he?

A. 26, '7 —

Q. Uh-huh, and you think maybe he did the calling to tell your father to come over?

A. I don't remember.

Q. Did anybody call A. Z. Turner that this boy right over here — the 19 year old boy — did anybody call him? Huh?

A. I don't know.

Q. No. The same fellow that was taking care of you in the cattle case — the other deal —

MR. ARNOLD: I object. "Taken care of in the cattle deal." He is going too far there.

THE COURT: Yes. The objection will be sustained.

MR. TACKETT: Why, Your Honor?

THE COURT: The question includes the words, "Taking care of".

MR. TACKETT: That's exactly what I was talking about.

THE COURT: Well, sir, if you have any evidence of that, you may offer it, but until you do, do not characterize it in such terms.

MR. TACKETT: Okay, just let him get off the stand, and I will prove it to you. Mr. Holliday, come around. Where is he? Well, I will just put Travis Ward on the stand.

THE COURT: Gentlemen, this is collateral. Is it necessary to interrupt the order of the trial for that?

MR. TACKETT: No, sir, I'm not asking to interrupt it, but every time I ask a question there is an objection made, and I have to rephrase it, or walk out of this room, or come up there and make excuses.

THE COURT: Well, sir, you know how to question properly, and —

MR. TACKETT: I sure do. I've been practicing this thing for 33 years.

THE COURT: All right, sir . . .

MR. ARNOLD: Your Honor, I don't like his speeches, either.

MR. TACKETT: I don't blame you.

THE COURT: No, sir, go ahead and question the witness, Mr. Tackett. I've ruled on the objection.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. You and Johnny had quite a conversation about it after knowing this body was going to be found out there,

didn't you — down at your house — you, and Jo, and Johnny, didn't you?

A. Just Johnny and I was talking.

Q. Yeah. What did you tell me your reason you went to Travis Ward for when I talked with you on Friday following this fatal Wednesday?

A. Travis Ward was the only one I knew that investigated.

Q. What did you tell me about the reason you didn't go to the City Police?

A. I don't remember.

Q. Didn't you tell me in the presence of A. Z. Turner and others, "I don't go to the City Police now because they are looking for an excuse to put me in jail, anyway"?

A. No, sir.

Q. What did you say about the City Police?

A. I didn't say that.

Q. What did you say?

A. I don't remember, but that wasn't what I said, if I said anything.

Q. Huh?

A. I may not have said anything about them.

Q. Didn't you also say that the City Police are always putting their nose in my business?

A. No, sir.

Q. Why did you — now, the time you made up your mind where to go, how many blocks did you live from this courthouse?

A. Five or six.

Q. Huh?

A. Five or six.

Q. Well, let's see. It's one block over, isn't it?

A. Yes, sir.

Q. And two blocks down is where you were living with Jo, is that right?

A. No, about four. It's about six blocks over there.

Q. How far is it out to Travis's house?

A. Not quite half a mile.

Q. Not quite half a mile. Why didn't you come up here three or four blocks away and report it to the sheriff like you were supposed to?

A. Because I didn't think to come to the sheriff.

Q. Didn't think to. You were thinking pretty good about who to go to, weren't you?

A. This is the first time I had ever been involved in anything like that, see, and I didn't know —

Q. Oh, I see. The first time you had been involved in murder?

A. Well, he came over to my house, and all this and that — now who — would you turn him in or would you just let it go?

THE COURT: Just answer questions, Mr. Turner.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. You didn't want to turn anybody in, did you? Didn't you go back and go to bed?

A. No, sir.

Q. Didn't you tell us that you went back and went to bed after Dennis got the car off up yonder?

A. I went back and set down — rephrase your — I mean, repeat your —

Q. Didn't you tell us on a Friday, that after Dennis came over there, and you and Dennis had been out there and as you say "stashed Larry's car", and wiped the fingerprints off of it and came back home, didn't you tell us that you went back and went to bed, and Johnny came over there and woke you up?

A. No, sir, I said that he came over there and I was sitting on the side of the bed thinking.

Q. What were you thinking about?

A. What to do — I couldn't believe it.

Q. You were just afraid you were going to get caught this time, weren't you?

A. No, sir.

Q. Now, I believe you said that you won in the poker game?

A. Yes, sir.

Q. You won how much?

A. I don't know exactly — around $40.00.

Q. Around $40.00. And you say Johnny lost?

A. Yes, sir.

Q. How much did he lose?

A. I don't know for sure, from $20.00 to $50.00.

Q. How do you know?

A. Just a guess.

Q. How do you guess at it that way?

A. By watching a fellow lose.

Q. Now, by losing — did he lose all the time, or did he win part of the time?

A. He won every now and then.

Q. You don't know what he lost, do you?

A. No, sir.

Q. And Larry, you said, lost $30.00 after you got there? Is that right?

A. That's another guess.

Q. That's another guess. Dennis lost $10.00, you say?

A. Yes, sir.

Q. And you won $40.00 — and Larry went there they say, with $500.00 — well, who else took the big loss after the sheriff's office recovered some $400.00?

A. I don't know.

Q. How much did Jackie win?

A. I don't know.

Q. But nobody has made a print of your hand or a print of your fingers to determine whether or not you used that pistol, have they?

A. They have already got my fingerprints down here.

Q. Has anybody taken your fingerprints or your palm prints concerning this shooting out here?

A. I don't think so.

Q. Have they ever gone to the trouble to have a fingerprint made or a print made of this defendant over here?

A. I don't know.

Q. Did I understand you to say awhile ago that Dennis acted normal in the game?

A. Yes, sir.

Q. Is that true? Is that the truth?

A. Yes, sir.

Q. Richard, why is it up until today you said that wasn't true?

A. He acted serious in the game.

Q. Uh-huh.

A. More serious than he usually does, but he did not act funny, or anything like that. He just acted more serious. He wasn't drunk.

Q. Could he read his cards?

A. Sir?

Q. Could he read his cards?

A. Yes, sir.

Q. Was he talking to himself?

A. Now, sometimes . . . well, he talked, "Well, I can't win a game," and this and that to himself. But now . . .

Q. Richard, didn't you tell me on Friday, when I was riding in your car in the back seat when you was taking me out to where this was supposed to have happened, didn't you tell me Dennis came there and acted crazy; that he couldn't read his cards; that he was just doing all kinds of peculiar things, and mumbling to himself, and you was trying to get him to quit, yourself. And Johnny finally got him to quit; now, didn't you tell me that?

A. I didn't say he was acting crazy.

Q. Listen, did you tell me anything different to what you did on that tape when you was telling it to Travis Ward. Did you tell me anything different?

A. No, sir.

Q. Same thing. If you said that, it would be on that tape, wouldn't it?

A. It should.

Q. Didn't you tell me, and tell on that tape, that you went back to bed after Dennis came to you and that you had helped Dennis stash the car?

A. No, sir.

Q. You didn't? Now, did I understand you to say that Jackie, Johnny's half brother — cashed a $100 check and gave change for a $100 bill — or cashed a $100 bill for Larry while the game was going on?

A. Yes, sir.

Q. Is that correct?

A. Right before the game broke up.

Q. Before the game broke up?

A. Well, it was just right at the end, yes, sir.

Q. Well, when was it; was the game going on, or not?

A. Yes, sir, it was going on.

Q. All right. Why did he get the change; was he losing?

A. Yes, sir.

Q. And he needed the money to put in the game, is that correct?

A. I guess — I suppose that's why he got change.

Q. Do you know why Jackie said that he borrowed the money after the game was over to go get something to eat; that he cashed one of these $100 bills after the game was over and after he had started to leave?

A. Would you repeat that? Sir?

Q. Did you know that Jackie had let you down?

A. Sir? I don't understand that.

Q. Well, okay, forget it. Did I understand you to say that Dennis came back after he come over there and borrowed your pistol? Came back to your apartment — to yours and Jo's apartment?

A. Yes, sir.

Q. Who opened the door?

A. I did.

Q. Do you know why Jo says she opened the door?

MR. ARNOLD: I object to that. I don't believe that was her testimony.

THE COURT: The jury will remember the testimony.

MR. TACKETT: Yes, sir, and I want it read to them, Your Honor, to be sure I'm right.

MR. ARNOLD: That's fine with me.

THE COURT: All right, sir. The witness has testified that he let Dennis in the second time he came back.

MR. TACKETT: Sir?

THE COURT: This witness has testified that he — this witness — let Dennis in the second time he came back.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. That's right. Now, do you know why Jo says that you were in the bed, and that she goes to the door and lets him in, and he comes in?

THE COURT: If that's what she said.

BY MR. TACKETT:

Q. If that's what she said. Do you know why she said that?

A. No, I don't.

Q. All right, Dennis came over there with you once, didn't he — came over with you one time after the poker game was over, didn't he?

A. They brought me home.

Q. Uh-huh. And you hollered for Jo to let you in, didn't you? Didn't you?

A. Yes, sir.

Q. Jo let you in, didn't she?

A. Yes, sir.

Q. And then you go back and ask where your pistol was, didn't you?

A. Yes, sir.

Q. Why did you ask her where it was?

A. Because I didn't know where it was. It usually hangs in the closet.

Q. When did Dennis tell you he wanted your pistol?

A. As we went in the front door.

Q. And you went in the front door, and the first words you uttered were, "Jo, where's my pistol." Is that correct? Huh? Where were you when you told Jo you wanted your pistol?

A. It was after we got in.

Q. After you got in the house — all right, were you at the front door?

A. I don't remember.

Q. Don't remember. But when you walked in the door, and Jo opened the door and let you in, and you asked her where the pistol was, didn't you?

A. I did ask her where the pistol was.

Q. Did she go get it or did you go get it?

A. She handed it to me.

Q. Where did she hand it from?

A. She laid down on the bed — and I — well, I guess that's when I asked her because she was on the bed.

Q. And then what — did you look for it before you asked her for it?

A. Yes, sir, I opened the closet.

Q. Well, why would you be looking for it in the front room and into the closet in the next room when you had asked her for it; you said the first thing you did when you went in was to ask her where the pistol was?

A. I said I didn't remember.

Q. Now, isn't it a fact that you told Jo to go down there and get that pistol when she went home about 2 o'clock, and she didn't bring it back to you, so you had to go and get it?

A. No, sir.

Q. But she handed you the pistol?

A. Yes, sir.

Q. At 4 o'clock in the morning, these fellows were going out to Perry's and get something to eat, and you let them have this dangerous pistol?

A. Yes, sir.

Q. Why?

A. I guess he wanted to use it.

Q. You would loan this pistol to anybody under any circumstances, is that right?

A. To any real good friend, I would.

Q. Uh-huh, and ask no questions about it?

A. He had used my guns before.

Q. Has he ever used this pistol before?

A. Yes, sir, one night.

Q. Where?

A. When we came back from Texarkana one night.

Q. Did he ever borrow your pistol?

A. I don't remember whether he ever used it — took it with him, but he has used it when I was around.

Q. Has he ever before in his life borrowed your pistol, or any other pistol?

A. He's borrowed my shotgun.

Q. I didn't say that. Did I say shotgun or pistol?

A. No, sir.

Q. Which was it?

A. Pistol.

Q. Has he ever borrowed a pistol from you before?

A. I don't think so.

Q. And he borrowed, you say, for the first time at four o'clock in the morning; did he tell you why?

A. No, sir.

Q. Did he tell you he was going hunting?

A. No, sir.

Q. What did you let him have the pistol for?

A. Because he asked to borrow it.

Q. What did you think he was going to do with it?

A. I didn't have any idea.

Q. Did you care?

A. I didn't . . . I asked him what he was going to do with it and he said, "I might need it".

Q. Might need it. What did you think he might need it for?

A. I don't know.

Q. And you just let him have the pistol because he said he thought he might need it?

A. Yes, sir.

Q. And you felt so unconcerned about it that you just go on back to bed, is that right?

A. Yes, sir.

Q. Went to bed with Jo, I guess?

A. Sir?

Q. Went to bed with Jo, I guess?

A. Yes, sir.

Q. And you say that Larry came and got you later; who opened the door that time?

A. Who?

Q. When Larry came and — when Dennis came and got you after he had borrowed the pistol and came back, who opened the door that time?

A. I did.

Q. You did? You know it wasn't Jo?

A. I remember opening the door.

Q. There's no reason in the world why Jo should think that she — should think that she opened that door, is there?

A. I don't guess.

Q. No reason. She didn't go to the door, did she? Jo didn't go to that door and open it and come up and holler at you, did she?

A. Now, are you talking about the second time?

Q. I am talking about the second time, when you were there, and she was there. She didn't open the door, did she?

A. No, sir.

Q. And she is just as wrong as she can be if she said she did it, and she's just trying to help you because you finally married her, isn't that correct?

A. No, sir.

Q. Now, you say that you drove out there with Dennis to look at the body on the road? Did you?

A. Yes, sir.

Q. Did you get out to see if Larry was dead or alive?

A. No, sir.

Q. Why?

A. He told me not to.

Q. Dennis told you not to?

A. Yes, sir.

Q. Was Larry as good a friend of yours as he was Dennis's? Hadn't all of you been friends?

A. Yes, sir.

Q. You mean some little guy 19 years old could keep you,

a grown man, from getting out and seeing whether or not this boy was dead or alive?

A. I didn't want to get out.

Q. Why didn't you want to get out?

A. I didn't know he wouldn't shoot me.

Q. You knew you had already been out there once, didn't you?

A. No, sir.

Q. Dennis is the only one, if he went out there with you, that hadn't seen that body before, wasn't he?

A. Would you repeat that?

Q. Well, I will ask you this: If you were driving along the road, and you saw some human being lying on the road, you wouldn't get out to see if he was dead or alive, if he was lying there?

A. He told me — he had just told me that he had shot him.

Q. Well, you didn't know whether he was dead or not, did you?

A. No, sir.

Q. Why didn't you get out and see if you could get a doctor, or something, instead of stashing away the automobile?

A. I guess I was scared.

Q. You are the only one in this shooting match besides Richard that had been in trouble before, weren't you? I mean, you and Richard, and Johnny — you are the only two — you've been operating pretty good and getting away with it, haven't you?

A. I don't know what you are talking about.

Q. Well, how many cows has your own daddy complained about losing?

A. I didn't know he complained about any.

Q. He hadn't complained about losing cattle?

A. Not to me.

Q. And you hadn't been stealing your own daddy's cattle?

A. No, sir.

Q. Now, did you go — you say Johnny came over to your house after you had stashed the automobile; did you go with Johnny out to Rocky Mound to show him whether or not the man was dead or alive?

A. No, sir.

Q. Did you start out there?

A. No, sir.

Q. Did you drive part of the way out there?

A. No, sir.

Q. Didn't you tell me and A. Z. Turner, and others, that Friday following this thing that Johnny says, "I want to go see, too"? That you drove out the Rocky Mound Road and just before you got there Johnny says, "I'm not going". And you turned around and didn't go on up there to where the body was found? Didn't you tell us that?

A. No, sir.

Q. That won't be on the tape, either, will it?

A. No, sir.

Q. You know you say that you got down there, "now, there's a man that's been killed", you say. You were so convinced you didn't even get out of the car. Did I understand you to say that after Dennis drove you out there and showed you the body and said, "It's dead". That you all drove on around the Rocky Mound Road and came out on the highway and came back out on the highway and came back to town; did I understand you to say that? Did you?

A. Yes, sir.

Q. Did I understand you to say that you stopped at Johnny's house, and that Dennis continued to drive Larry's car, and you drove Dennis's car?

A. Yes, sir.

Q. And what happened then — did I understand you to say that you drove down through town and around the brick house and so forth, to stash that car?

A. Yes, sir.

Q. And that the fingerprints were wiped off of it?

A. I suppose he did.

Q. And you are not guilty of accessory after the murder?

A. No, sir.

Q. You helped stash the car with him?

A. I — it was all I could do.

Q. Why?

A. I didn't know he wouldn't shoot me.

Q. Well, where was the pistol?

A. He had it.

Q. Where was he?

A. He was in the other car.

Q. In the other car — and you were driving along there, 22 years of age and an experienced driver, and you was afraid that the fellow you was going to turn around and shoot you? Is that what you are telling this jury?

A. Yes, sir.

Q. Now, you went out and helped stash the death car, is that correct?

A. Yes, sir.

Q. And you haven't been charged with murder in this case, have you?

A. No, sir.

Q. Haven't even as an accessory, have you?

A. No, sir.

Q. How did you know that he was wiping off fingerprints?

A. I said I supposed he was; that's what it looked like.

Q. Why didn't you think he might have been wiping off blood?

A. I didn't know.

Q. You didn't know. You knew there wasn't any blood in that car, didn't you?

A. No, sir.

Q. But you had blood on yourself, and you wanted to pretend that it might have come off the pistol. Just a

minute ago didn't you say that Dennis said there might be blood on that pistol?

A. No, sir.

Q. Didn't you say that in your testimony awhile ago?

A. No, sir.

Q. What did you say that Dennis said about blood being on the pistol?

A. He said there might be blood in the car.

Q. Blood in the car. And you have told others that you got some blood off of your person — on you in the car, didn't you?

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. Now, I'll ask you one more thing: Did you and Johnny drive Dennis out to his house and put him out in his yard?

A. No, sir.

Q. Where does Dennis live?

A. Lewisville Road.

Q. How far does he live out of town?

A. Five or six miles.

Q. All right, when you drive down the Lewisville road street here in town, you pass — you go down by the high school, don't you?

A. Yes, sir.

Q. And on the right up there at the curve at the high school is where his father has a store, is that correct?

A. Yes, sir.

Q. And you go on out that road about four or five miles and you come to where Dennis lives, don't you?

A. Yes, sir.

Q. Don't you know that one of you drove Dennis's car and took Johnny back, and you all left Dennis sitting out there at his house?

A. No, sir.

Q. Do you know why your daddy went to the Oaks Restaurant the next morning and said you drove him home for?

A. I didn't know he did.

Q. He was talking too much, too, wasn't he?

A. (No answer)

Q. And over at the races not long ago, did you go to the races with Johnny and some others?

A. The horse races?

Q. Yes.

A. Yes, sir.

Q. Didn't Johnny tell you over there at the races in front of some other people that if you keep talking, you are going to be in Dennis Turner's shoes? Didn't he tell you that?

A. I don't remember him telling me that.

Q. Don't you remember him telling you to quit talking

about this case before you talked yourself into Dennis Turner's shoes?

A. No, sir.

Q. Do you remember him mentioning it over there at the races?

A. No, sir.

Q. Did you tell anyone that Travis Ward did not want to take your statement as you first gave it to him?

A. No, sir.

Q. Are you sure of that, too?

A. Yes, sir.

Q. Didn't Travis Ward suggest to you that you say that Dennis got drunk and shot him?

A. No, sir.

Q. That wasn't mentioned, was it?

A. No, sir.

Q. That wasn't mentioned, was it?

A. No, sir.

Q. Oh, incidentally, were you one of the folks that took the witness stand there and practiced testifying in this case?

MR. ARNOLD: Your Honor, I object to 'practicing'. You have ruled that out.

THE COURT: I will sustain the objection as to the characterization. Rephrase your question.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. I will ask you if last Wednesday night, if you were placed on the witness stand where you are seated right now, and you were examined and cross examined?

A. Yes, sir.

Q. Did they tell you why?

A. Yes, sir.

Q. They didn't want you to bust in this one, did they?

A. No, sir.

Q. Did you ever hear of that being done before, in the history of the United States of America?

A. I've never been in court before like that.

Q. There are a lot of times that you ought to have been, though, wasn't there? Such as stealing cattle, and running around with girls up in Indiana? You've never been here as a defendant, have you?

A. No, sir.

Q. (After pause) Oh, yes, you went out there on a Monday morning and looked at the place where the body was again, didn't you? After his body was taken to the morgue, didn't you go out there with some other folks and look?

A. Yes, sir.

Q. Did you find any footprints down there that would match, as you say that he got out of his car and walked back down to the body — did you find one track that might be his shoes?

A. I wasn't looking for any.

Q. The officers looked pretty hard, didn't they?

A. I don't know.

Q. Did you find any tracks there other than some cowboy bootheel tracks?

A. I didn't look for any.

Q. Well, what were you out there for, if you weren't looking?

A. I just drove out there where he was shot.

Q. Do you know what kind of shoes Dennis had on that night?

A. No, sir.

Q. Do you know what kind of heels they had on them?

A. No, sir.

Q. Have the officers advised you of finding anything that resembled his tracks out there?

A. No, sir.

Q. They found yours out there, though, didn't they?

A. I . . .

Q. Yours were out there, weren't they? Weren't they?

A. Well, I walked out there.

Q. Yes. While ago, you didn't even get out of the car.

A. Well, I —

Q. They found your tracks out there, didn't they?

A. I did get out when — this was . . .

MR. ARNOLD: Your Honor, let him answer his question.

THE COURT: Yes, let him answer the question, Mr. Tackett.

BY THE WITNESS:

A. My tracks were out there after all this happened, not before.

BY MR. TACKETT:

Q. When did you get out?

A. I got out when I took Travis Ward out there.

Q. Took Travis Ward out there; Travis was out there, too, wasn't he?

A. Yes, sir.

Q. Your tracks were there? Weren't they?

A. Yes, sir.

Q. And you say you got out of the car out there with Travis?

A. Yes, sir.

Q. Why did you refuse to get out of the car when you went out there with me?

A. With who?

Q. When you went out there with me on Friday, why wouldn't you get out of the car? Why did you sit in that car all the time we were there?

A. I didn't.

Q. Didn't you make a statement, "I don't want my tracks out here"?

A. No, sir.

Q. Did you ever look at Larry's car to determine whether or not it had any blood on it?

A. No, sir.

Q. Why didn't you?

A. Didn't want to.

Q. Did you ever look at that yellow one you was driving to see if it had any on it?

A. No, sir.

Q. The reason you didn't look at that one is because you know that Larry Yates was no more killed out there at the place where his body was found than I was, don't you? You know that deep down, that he wasn't killed out there, don't you?

A. I don't know whether he was or not. That's where he was.

Q. And you and Johnny took him out there, didn't you?

MR. ARNOLD: Your Honor, let him answer the question.

THE COURT: Just a moment. He answered the question. Go ahead, Mr. Tackett.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. You and Johnny took him out there, didn't you?

A. No, sir.

Q. If this little old Jo had come in here and not stayed with you and saved your life, you couldn't be found over there, and that little next door neighbor, you couldn't be found over there from four to six o'clock, could you, in that apartment?

A. I was there.

Q. And you are going to say that you didn't drive — you and Johnny didn't drive, or you and someone, didn't drive Dennis home that morning and put him out in his yard in his car?

A. No, sir.

MR. TACKETT: That's all.

MR. ARNOLD: No further questions.

THE COURT: You may step down. Return to the witness room. Call your next witness.

MR. ARNOLD: Mr. Herbert Griffin.

MR. TACKETT: Just a minute. Have a seat there.

CROSS EXAMINATION CONTINUED
BY MR. TACKETT:

Q. I will ask you if you and Johnny — do you know Bobby Allen?

A. Yes, sir.

Q. I will ask you if you and Johnny didn't put a pistol in his car and threaten to kill him right over here just the other side of this Dairy Queen?

A. I did not.

Q. Were you there?

A. Yes, sir.

Q. And Johnny had the pistol in his car, didn't he?

A. Yes, sir.

Q. And didn't you have one in your belt?

A. Yes, sir.

Q. Didn't you say, "Bobby, don't talk; I'll kill you, and my daddy won't ever let me be in trouble"?

A. No, sir.

Q. And didn't he say, "Can your daddy get you out of the grave"? Didn't he tell you that?

A. No, sir.

Q. And you've never bothered Bobby Allen any more, have you?

A. I've been friends with him.

MR. TACKETT: Friends? Okay, that's all.

THE COURT: Mr. Arnold, any questions?

MR. ARNOLD: No further questions.

THE COURT: Return to the witness room. Call your next witness.

(Witness Stands Aside)

MR. ARNOLD: Mr. Herbert Griffin.

HERBERT GRIFFIN,

being called as a witness in behalf of the State of Arkansas, and after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ARNOLD:

Q. State your name.

A. Herbert Griffin.

Q. Mr. Griffin, where do you live?

A. I live at 409 South Greening, Hope, Arkansas.

Q. What is your occupation?

A. Deputy sheriff of Hempstead County.

Q. How long have you been in this position?

A. Ten years.

THE COURT: Mr. Griffin, lean forward and talk into the microphone, please, sir.

DIRECT EXAMINATION CONTINUED
BY MR. ARNOLD:

Q. Mr. Griffin, you are brother to Jimmie Griffin, Sheriff of Hempstead County?

A. I am, sir.

Q. On December the — I call your attention to December the 25th, Christmas Day, 1968 — and ask you if you were contacted as to investigating the death of Larry Yates?

A. I was, sir.

Q. You were?

A. Yes, sir.

APPENDIX B

COURT'S NO. 11

I will define for you the law relative to the different degrees of homicide included in this charge, or Information, accusing the defendant of murder in the first degree, without reference to the law of insanity. I will speak of that later.

Murder is the unlawful killing of a human being, against the peace of the State, with malice aforethought, either express or implied.

The manner of the killing is not material, further than it may show the disposition of the mind, or the intent with which the act was committed.

Malice, or express malice, is that deliberate intention of mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or where all the circumstances of the killing manifest an abandoned and wicked disposition.

The statute provides that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing; or, which shall be committed in the perpetration of, or in the attempt to perpetrate arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree. All other murder shall be deemed murder in the second degree.

Robbery is defined by statute as the felonious and violent taking of any goods, money, or other valuable

things, from the person of another, by force or intimidation. The manner of the force, or the mode of the intimidation, is not material, further than it may show the intent of the offender. The incident referred to is the intent to steal.

You will observe from these definitions that in order to constitute murder in the second degree, it is necessary to show that the killing was unlawful and done with malice aforethought. It is immaterial for how long the malice, if any, existed, so that it existed and preceded and caused the homicide. No deliberation is necessary in murder in the second degree.

To raise it to murder in the first degree, there must not only be malice aforethought, but the specific intent to kill, and premeditation and deliberation, or, a killing with malice in the perpetration of a robbery. Premeditation means thought of beforehand. Deliberation means a weighing in the mind of the consequences of a course of conduct as distinguished from acting upon a sudden impulse without the exercise of reasoning powers. It is immaterial for how long the premeditation and deliberation existed, so that they did exist and precede the homicide.

A specific intent to kill, premeditation, and deliberation are not elements of first degree murder in the perpetration of robbery.

To make it clear to you, if the killing is unlawful and done with malice aforethought, and nothing more is proved, it is murder in the second degree. If, in addition to that, there was a specific intent to kill and premeditation and deliberation, or a killing in the perpetration of robbery, it would be murder in the first degree. There can be no murder without malice, either first or second degree.

COURT'S NO. 13

An accessory is one who stands by, aids, abets, or assists, or who not being present, aiding, abetting, or assisting, advised and encouraged the perpetration of the crime.

An accessory after the fact is a person, who after a full knowledge that a crime has been committed, intentionally conceals it from the magistrate, or harbors, or protects the person charged with or found guilty of the crime.

All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such.

COURT'S NO. 14

A statute provides that the jury cannot convict anyone charged with a felony on the uncorroborated evidence of an accomplice.

By accomplice is meant any person who had anything to do with the commission of the offense charged, and the evidence of any accomplice, uncorroborated, will not justify any jury in convicting a defendant, even though they believe the testimony of the accomplice beyond a reasonable doubt. You will observe that the corroborating evidence of an accomplice must not only show the facts and circumstances of the case, but also show the defendant's connection with it. The jury must not make the mistake of thinking the corroborating evidence itself should be sufficient to convince you of his guilt beyond a reasonable doubt.

This instruction tells you first, that the evidence of an accomplice must be corroborated; and second, that all the

evidence in the case, taken together, should convince you of the defendant's guilt beyond a reasonable doubt, before you can convict.

You are instructed that if you find from the evidence that the witness Johnny Mitchell is an accomplice, or that the witness Richard Turner is an accomplice, because either or both of them is equally guilty with the defendant, if the defendant is guilty; then you are instructed that although you may believe the testimony of the witness Johnny Mitchell, if you find he was an accomplice, or the witness Richard Turner, if you find that he was an accomplice, you would not convict the defendant on their testimony unless you find their testimony is corroborated by other testimony, or evidence, either by direct or circumstantial evidence, tending to connect the defendant with the crime.

This other evidence is not sufficient if it only shows the facts and circumstances that the offense was committed, but it must go farther and show affirmatively that the defendant was connected with the crime and the commission of it.

This instruction does not mean to tell you that the corroborating evidence must of itself be sufficient to convince you of the defendant's guilt beyond a reasonable doubt, but it means the evidence of Johnny Mitchell or Richard Turner, if they were accomplices, or either of them, must be corroborated, and that all the evidence in the case taken together, must be sufficient to convince you of the defendant's guilt beyond a reasonable doubt before you can convict the defendant of anything.

COURT'S NO. 19

Now, members of the jury, if you find from the evidence beyond a reasonable doubt that the defendant, Dennis Turner, in Hempstead County, Arkansas, and on the date alleged, did unlawfully, willfully, and with malice, shoot, and thereby cause the death of Larry Wayne Yates, while in the perpetration of robbery, you will find the defendant, Dennis Turner, guilty of first degree murder.

If you fail to so find, or if you entertain a reasonable doubt thereof, you will not find him guilty of first degree murder as to that part of the Information filed in this case.

If you find from the evidence beyond a reasonable doubt that the defendant, Dennis Turner, in Hempstead County, Arkansas, and on the date alleged, did unlawfully, willfully, maliciously, and after premeditation and deliberation, shoot and thereby cause the death of Larry Wayne Yates, you will find the defendant guilty of murder in the first degree.

If you fail to so find, or entertain a reasonable doubt of any element thereof, you will not find the defendant guilty of murder in the first degree as to that part of the Information filed in this case.

If you find from the evidence beyond a reasonable doubt that the defendant, Dennis Turner, in Hempstead County, Arkansas, on the date alleged, did unlawfully, willfully, and with malice aforethought, shoot and thereby cause the death of Larry Wayne Yates, you will find the defendant guilty of second degree murder.

If you fail to so find, or if you entertain a reasonable doubt of any element thereof, you will not find him guilty of second degree murder.

If, upon the whole case, you entertain a reasonable doubt of the defendant, either of first degree murder or second degree murder, then it would be your duty to return a verdict of not guilty.

If you find from a preponderance of the evidence that the defendant, Dennis Turner, was insane on the date of the alleged crime as that defense has been explained to you, you will find him not guilty by reason of insanity.

I will now call upon counsel for any additional requests for charge, or any additional objections. For the State?

BY MR. ARNOLD:

None, Your Honor.

BY THE COURT:

For the defense?

BY MR. TACKETT:

None.

BY THE COURT:

Very well, you may argue.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
MAY 22 1972
MICHAEL RODAK, JR., CLERK

No. 71-1309

DENNIS TURNER, *Petitioner*

v.

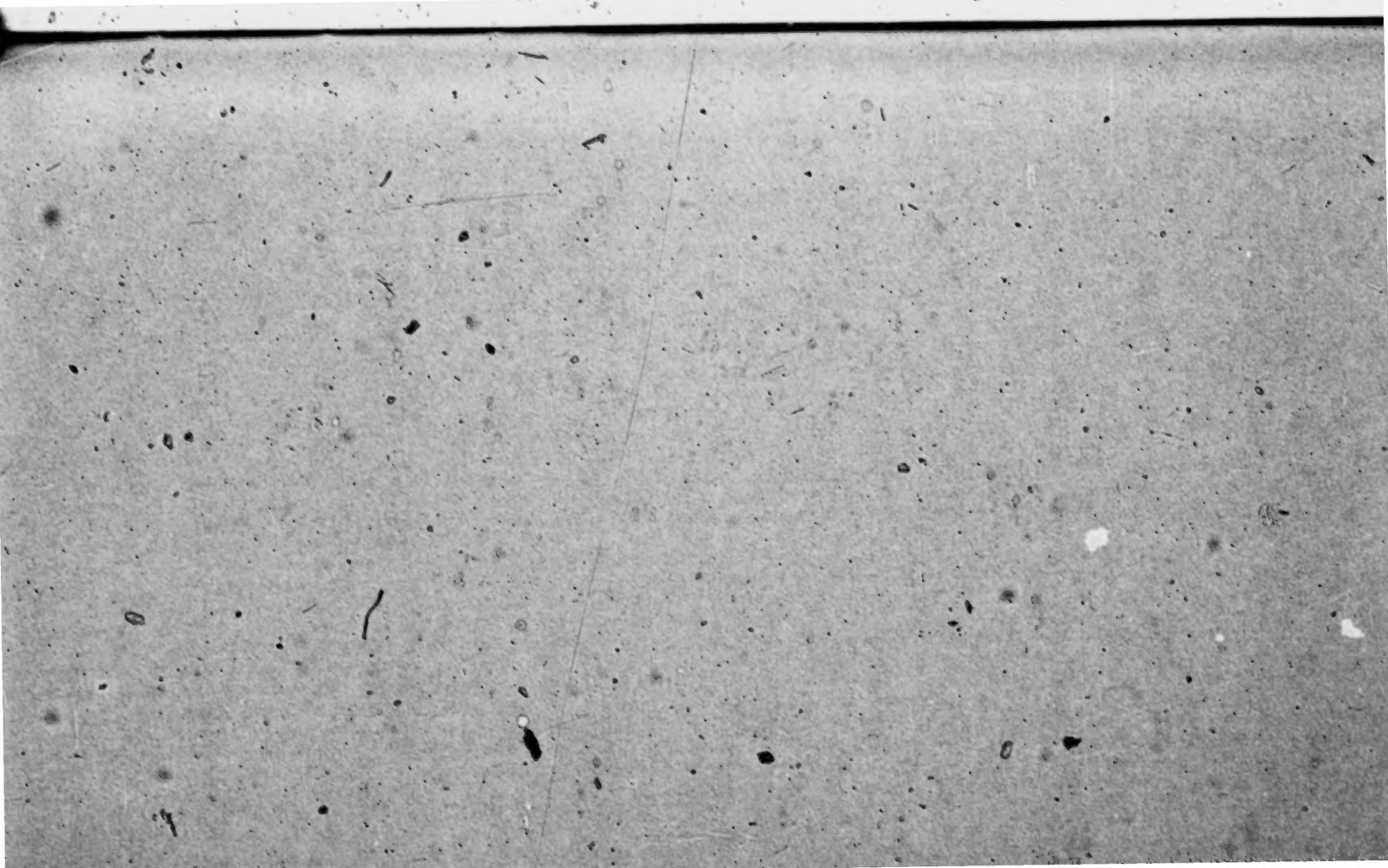
STATE OF ARKANSAS, *Respondent*

REPLY OF PETITIONER TO RESPONSE OF STATE OF ARKANSAS

BOYD TACKETT
421 Hickory Street
Texarkana, Arkansas 75501

ROYCE S. WEISENBERGER, JR.
501 East Sixth Street
Texarkana, Arkansas 75501

Attorneys for Petitioner



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REPLY OF PETITIONER TO RESPONSE OF STATE OF ARKANSAS

REASONS FOR SUSTAINING THE WRIT

Respondent State of Arkansas is now contending that the principle enunciated by this Court in *Ashe v. Swenson*, 397 U.S. 436, does not give rise to an "ultimate" issue on which the jury grounded its verdict of not guilty to the charge of murder (while committing robbery), and that, therefore, the Petitioner is subject to be tried upon the charge of robbery.

The Respondent State of Arkansas follows the contention of the Petitioner in insisting that in order

for an ultimate issue to be presented that the robbery and murder occurred on the same occasion and by the same person or persons. However, contrary to the Stipulation filed herein by Respondent State of Arkansas and Petitioner Dennis Turner (Appen. to Petition for Writ, pgs. 13a-15a), Respondent now argues that the jury could have found that the murder and robbery occurred at separate times and the Petitioner did not murder while he might have robbed. It definitely appears that the State of Arkansas has either neglected or cares to ignore the Stipulation in an effort to cause this Court to deny the Writ for Certiorari.

The Respondent imagines a multitude of possibilities in an effort to circumvent its Stipulation and contend that while Petitioner did not murder he could have robbed. Ignoring the Stipulation, Respondent contends that a principal witness for the State of Arkansas, Richard Turner, in nowise related to Petitioner Dennis Turner, could have murdered Larry Wayne Yates subsequent to Yates being robbed by either or both Petitioner Dennis Turner and witness Richard Turner—insisting, contrary to its Stipulation, that Petitioner could have committed robbery without committing murder — further speculating that witness Richard Turner could have committed

the robbery and the murder. Petitioner insists that this matter is to serious for speculation, conjectures, and imagination of the Respondent.

STIPULATION

(Appen. to Petition for Writ, pgs. 13a-15a)

Petitioner Dennis Turner and Respondent State of Arkansas stipulated that the evidence adduced by and on behalf of the State of Arkansas (Murder while committing Robbery), upon which charge Petitioner Dennis Turner was found not guilty, constitutes all of the evidence that can be utilized by and on behalf of the State in any trial of the Defendant upon the charge of Robbery; that the pleadings, evidence, proceedings, judgment, and stipulations entered into by and between the parties in the murder case should be considered a part of the record in the instance case—Robbery; that whoever (one or more people) killed Larry Wayne Yates also robbed him at the same time and place and on the same occasion; that whoever (one or more people) robbed Larry Wayne Yates also killed Larry Wayne Yates, at the same time and place and on the same occasion; that if Defendant Dennis Turner killed or participated in the killing of Larry Wayne Yates, he also robbed or participated in the robbing of Larry Wayne Yates;

that if Defendant Dennis Turner robbed or participated in the robbing of Larry Wayne Yates, he also killed or participated in the killing of Larry Wayne Yates; that if Defendant Dennis Turner did not kill or participate in the killing of Larry Wayne Yates, he did not rob or participate in the robbing of Larry Wayne Yates; and that if Defendant Dennis Turner did not rob or participate in the robbing of Larry Wayne Yates, he did not kill or participate in the killing of Larry Wayne Yates; that the same testimony adduced by and on behalf of the State of Arkansas in the murder case against Dennis Turner will necessarily be reintroduced in the Robbery charge against Dennis Turner; and that there will be no additional testimony introduced by and on behalf of the State of Arkansas than has been introduced in the Murder case.

TESTIMONY OF WITNESS RICHARD TURNER

For some inexplicable reason Respondent State of Arkansas cites considerable testimony of State witness Richard Turner as basis for speculation and conjecture that the robbery and murder did not occur on the same occasion, and that perhaps Dennis Turner could have robbed but not killed Larry Wayne Yates. This testimony by Richard Turner would conclusively establish that Petitioner Dennis Turner

robbed and killed Larry Wayne Yates on the same occasion.

The principal witnesses for the State of Arkansas concerning the robbery and murder are Richard Turner and Johnny Mitchell—two adults who were engaged in a Christmas Eve night poker game with two teenagers, Petitioner Dennis Turner and now deceased Larry Wayne Yates. They testify that Dennis Turner at 4:00 o'clock, a.m., on Christmas Day borrowed a pistol from Richard Turner, left in an automobile being driven by Larry Wayne Yates, and that thirty minutes later Dennis Turner returned to the home of and reported to Richard Turner that he had robbed and killed Larry Wayne Yates, exhibiting the murder pistol, empty shells, and the billfold and money belonging to Larry Wayne Yates. That Dennis Turner and Richard Turner drove to and viewed the body of Larry Wayne Yates and then immediately reported this matter to Johnny Mitchell. Richard Turner, according to his testimony, then helped Dennis Turner to hide the Larry Wayne Yates automobile.

The testimony of the State, if believed, would conclusively establish that Dennis Turner, within a period of thirty minutes, robbed and killed Larry Wayne Yates. However, Respondent State of Ar-

kansas has failed to advise this Court of the testimony of Richard Turner and Johnny Mitchell, including recorded statements they gave on Christmas Day, a short time after the robbery and killing, to the principal Investigating Officer, Sergeant Travis Ward, Criminal Division, State Police Department, wherein they contradicted themselves and each other in an effort to absolve themselves.

Contrary to the testimony of Richard Turner and Johnny Mitchell, Richard Turner's taped statement to the Investigating Officer was that after the poker game broke up and as the players were leaving at 4:00 o'clock in the morning, and immediately before Richard Turner loaned his pistol to Dennis Turner, Johnny Mitchell told Richard Turner to watch Dennis Turner because Dennis had some notion of getting Larry's money.

State witnesses Richard Turner and Johnny Mitchell testified that Dennis Turner acted normal throughout the night of the poker game, but Richard Turner stated on the tape that Dennis seemed serious about everything, and he had never acted that way before, and Johnny Mitchell stated on tape that he didn't know whether it was medicine, but that Dennis Turner was just a different person at the time.

Richard Turner testified that he did not go to sleep after Dennis Turner borrowed his pistol and left with Larry Wayne Yates. However, Johnny Mitchell stated on the tape that he woke Richard Turner after Dennis Turner had reported the robbery and killing to him.

Johnny Mitchell testified that he did not go to the scene of the body. He stated on the tape that he drove to the scene of the body and that Dennis Turner asked Richard Turner to leave the car and look at the body of Larry Wayne Yates—and that neither Richard Turner nor Dennis Turner wanted to touch the body.

Richard Turner testified that at the scene of the body Dennis Turner left the automobile, viewed the body, and stayed there for a time. Richard Turner stated on the tape that Dennis Turner stated that he did not want to touch Larry—that Richard Turner did not, either—and that they drove on down the road.

The tape recordings of these two principal witnesses (Tr. 393-396) revealed many other important discrepancies of their testimony—enough for the jury to conclusively establish that neither was worthy of

belief, and that teenage Petitioner Dennis Turner had been doped and used by these adults.

CONCLUSION

Until now the State of Arkansas has continuously insisted that Dennis Turner robbed and killed Larry Wayne Yates in a thirty-minute period during early Sunday morning. The State so stipulates in this cause. At this late hour the State in effect says that its proof meant nothing during the murder trial, that its Stipulation should be ignored, and that through some means double jeopardy should be overlooked and Dennis Turner be tried again for crimes occurring at the same time and on the same occasion.

There was ample proof at the murder trial that after the robbery and murder two automobiles accompanied Dennis Turner to his home in the rural area; that one of the automobiles drove away, leaving Dennis Turner in his automobile within the yard of his home; that Dennis Turner sometime thereafter walked into his bedroom, left the murder pistol and Larry Wayne Yates' billfold and money in his pocket—attempting to hide nothing. Yes, the jury could have only concluded that Larry Wayne Yates was robbed and killed on the

same occasion by some person or persons other than Dennis Turner, who was doped and being used by adults after they became frightened and were only concerned with clearing themselves.

There is no way to escape the fact that *Ashe W. Swenson*, 397 U.S. 463, applies in this case.

Respectfully submitted,

BOYD TACKETT
421 Hickory Street
Texarkana, Arkansas 75501
ROYCE S. WEISENBERGER, JR.
501 East Sixth Street
Texarkana, Arkansas 75501

Attorneys for Petitioner

TURNER *v.* ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 71-1309. Decided June 19, 1972

Petitioner received a general verdict of acquittal on an information charging him with murder in the course of a robbery. When petitioner was subsequently indicted for the robbery, his defense, rejected by the state courts, was that constitutional principles of double jeopardy collaterally estopped the State from relitigating those factual issues already determined in his favor, determinations that make his conviction of robbery logically impossible. *Held:* It must be concluded that the jury (which had been given a charge on accessories) found that petitioner was not present at the robbery-murder scene, thus negating the possibility of a constitutionally valid conviction for the robbery. *Ashe* v. *Swenson*, 397 U. S. 436.

Petition for certiorari granted; 251 Ark. 499, 473 S. W. 2d 904, reversed.

PER CURIAM.

On December 24, 1968, petitioner, one Richard Turner (no relation to petitioner), the decedent Larry Wayne Yates, and one other person were involved in a poker game, which lasted until the early hours of Christmas morning. After he left the game, Yates was murdered and robbed, and an information filed on December 27 charged that:

> "[Petitioner] on the 25th day of December, 1968 . . . did unlawfully, wilfully, feloniously and violently take from the person of one Larry Wayne Yates . . . a sum of money in excess of $300.00 . . . forcibly and against the will of the said Larry Wayne Yates . . . and while perpetrating said crime of robbery as aforesaid, feloniously, wilfully and with malice aforethought, and with premeditation and deliberation did kill and murder one Larry Wayne Yates . . . ."

On April 24, 1969, petitioner received a general verdict of acquittal on this information.

On October 3, 1969, however, a county grand jury indicted petitioner for the robbery of Yates and alleged that petitioner:

> "on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully take from Larry Yates by force and intimidation lawful currency in the amount of Four Hundred Dollars ($400.00) belonging to the said Larry Yates, against the peace and dignity of the State of Arkansas."

Petitioner moved to dismiss this indictment on double jeopardy and *res judicata* grounds, but the trial court denied the motion. On appeal, it was stipulated that "the murder charge, of which Defendant Dennis Turner was acquitted, and the robbery charge arose out of the same set of facts, circumstances, and the same occasion" and that "the same testimony adduced by the State of Arkansas in the murder trial will necessarily need be reintroduced in this robbery charge." A divided Arkansas Supreme Court affirmed the denial of petitioner's motion, *Turner* v. *State*, 248 Ark. 367, 452 S. W. 2d 317 (1970), holding that the only question determined at the murder trial was whether petitioner was guilty of murder. The court pointed out that under state law, murder and robbery charges could not be joined in one indictment or information and that no offense could be jointly tried with murder. Petitioner's rehearing petition, which argued the relevance of this Court's holding in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), announced seven days after the Arkansas Supreme Court's decision, was denied. Petitioner then entered the complete transcript of the murder trial into the record and once again moved to dismiss the indictment on double jeopardy and *res judicata* grounds, and the trial court again denied the motion.

An amended stipulation provided that the evidence the State would present on the robbery charge would be identical with that it introduced on the murder charge. The Arkansas Supreme Court affirmed the decision of the trial court, 251 Ark. 499, 473 S. W. 2d 904 (1971), declining to consider the applicability of this Court's decision in *Ashe* v. *Swenson, supra,* because it held that its earlier decision denying petitioner relief now constituted the "law of the case."

Petitioner contends that Fifth Amendment principles of double jeopardy, see *Benton* v. *Maryland,* 395 U. S. 784 (1969), prevent his trial on the robbery indictment, because the State is collaterally estopped from relitigating those issues already determined in his favor at the murder trial, determinations that make his conviction on the robbery charge a logical impossibility. Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, *Ashe* v. *Swenson, supra,* and it is "a matter of constitutional fact [this Court] must decide through an examination of the entire record." *Id.,* at 443. Thus, the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue.

In *Ashe,* the defendant had been tried and acquitted by a general verdict of the robbery of one member of a poker game. He was then tried and convicted of the robbery of another of the poker players. This Court reversed his conviction, concluding that "[t]he single rationally conceivable issue in dispute before the jury [in the first trial] was whether the petitioner had been one of the robbers," 397 U. S., at 445, and that, this issue once having been determined by a jury in the petitioner's favor, the State was forestalled from relitigating it.

In the present case, petitioner was not charged with robbery at the first trial, but the State has stipulated that the robbery and murder arose out of "the same set of

facts, circumstances, and the same occasion." The crucial question, therefore, is what issues a general verdict of acquittal at the murder trial resolved. The jury was instructed that it must find petitioner guilty of first-degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. The State's theory, however, is that the jury might have believed that petitioner and Richard Turner robbed Yates, but that Richard actually committed the murder. This theory is belied by the actual instructions given the jury.* The trial judge charged that:

> "An accessory is one who stands by, aids, abets, or assists . . . the perpetration of the crime.
>
> . . . . . .
>
> "All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such." (Court's Instruction No. 13.)

Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates.

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*These instructions reflect Ark. Stat. Ann. § 41-2227 which makes accessories before the fact to first-degree murder subject to the same punishment as principals. Ark. Stat. Ann. § 41-118 abolished the distinction between principals and accessories before the fact and also provides that "all accessories before the fact shall be deemed principals and punished as such." Ark. Stat. Ann. § 41-119 defines an accessory as "he who stands by, aids, abets, or assists . . . the perpetration of the crime."

This case is thus squarely controlled by *Ashe* v. *Swenson, supra,* and must be reversed. See *Harris* v. *Washington,* 404 U. S. 55 (1971).

The writ of certiorari is granted, the decision of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

MR. JUSTICE BLACKMUN with whom MR. JUSTICE REHNQUIST joins, concurring.

Given the decision in *Ashe* v. *Swenson,* 397 U. S. 436 (1970) (see, however, my dissent in *Harris* v. *Washington,* 404 U. S. 55, 57 (1971)), I join the judgment of the Court.

THE CHIEF JUSTICE, rather than taking summary action in this case, would hear oral argument and give the matter plenary consideration.